Supreme Court, U.S.
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No. 04-___

IN THE

Supreme Court of the United States

NEIL RANDALL, ET AL.,

Petitioners,

—v.—

WILLIAM H. SORRELL, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on candidate expenditures violate the First Amendment and this Court's decision in *Buckley v. Valeo,* 424 U.S. 1 (1976).

2. Whether Vermont's treatment of independent expenditures by political parties and committees as presumptively coordinated if they benefit fewer than six candidates, and thereby subject to strict contribution and expenditure limits, is consistent with the First Amendment and this Court's decision in *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996).

3. Whether Vermont's contribution limits, which are the lowest in the country, which allow only a single maximum contribution in an entire two-year general election cycle, and which prohibit even state political parties from contributing more than $400 to their gubernatorial candidate, fall below an acceptable constitutional threshold and should be struck down.

LIST OF PARTIES

Petitioners are Neil Randall, George Kuusela, John Patch, Steven Howard, Jeffrey Nelson, and the Libertarian Party of Vermont.

Consolidated Plaintiffs are Marcella Landell, Donald R. Brunelle, Vermont Right to Life Committee, Inc., Political Committee, Vermont Republican State Committee, and Vermont Right to Life Committee-Fund for Independent Political Expenditures.

Respondents are the Attorney General of the State of Vermont, William H. Sorrell, the Secretary of State of the State of Vermont, Deborah Markowitz, and various state and local officials charged with enforcement of the challenged statute: John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, and Robert L. Sand.

Respondent-Intervenors are Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, and Maria Thompson.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners are a corporation that has issued shares to the public, nor are any a parent corporation, a subsidiary or affiliate of corporations that have done so.

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OPINIONS AND ORDERS BELOW

The original decision of the District Court finding 17 V.S.A. §§ 2801-2809 constitutional in part and unconstitutional in part, was entered on August 10, 2000. The court's opinion is reported as *Landell v. Sorrell*, 118 F.Supp.2d 459 (D.Vt. 2000), and is reprinted in the Appendix ("App.") at App. 21a-89a. The Second Circuit panel decision affirming the District Court judgment in part and vacating it in part, and remanding for further proceedings was entered on August 7, 2002. That opinion, 300 F.3d 129 (2nd Cir. 2002), was withdrawn and is not reprinted in the appendix. On August 18, 2004, the Second Circuit issued an amended opinion, 382 F.3d 91 (2nd Cir. 2004), which is reprinted at App. 90a-312a.

Rehearing and rehearing *en banc* were denied on February 11, 2005. App. 313a-314a. The *Order* denying the petition was twice subsequently amended to reflect that the rehearing petition was denied by a vote of 6-5. The second *Order* contains the separate concurring and dissenting opinions of the circuit judges, and is reprinted at App. 315a-344a.

JURISDICTION

The Second Circuit's amended decision reversing in part and affirming in part the District Court's decision was entered on August 18, 2004. On February 11, 2005, that court entered an order denying plaintiffs' petition for rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I, § 1.

1997 Vt. Laws P.A. 64 (codified at 17 V.S.A. §§ 2801 et seq.) is set out in full in the Appendix to the petition. App. 1a-20a.

STATEMENT OF THE CASE

This is a First Amendment challenge to Vermont's comprehensive campaign finance law, 1997 Vt. Laws P.A. 64 (codified at 17 V.S.A. §§ 2801 et seq.) ("Act 64"). Vermont's law was adopted in 1997 with the "express intent" of challenging *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and became effective the day after the November 1998 election. Act 64 challenged *Buckley* by imposing mandatory, unprecedented limits on the amount of money candidates for statewide or legislative office may lawfully raise or spend on their campaigns. These spending limits apply to all candidates, even those who spend their own funds or obtain contributions from legal sources. The Act broadly defines an expenditure to include various personal and in-kind expenses, and limits the right of political organizations to make independent expenditures supporting candidates by presuming that certain expenditures are coordinated with the candidate. The Act also imposes the lowest contribution limits in the country, which are enforced on a per-election-cycle basis. The limits apply equally to political parties and committees. A separate provision limits the amount of money candidates can raise from out-of-state sources.

This case arises from three separate lawsuits filed in 1999 and 2000, which were consolidated in the district court. The plaintiffs in these consolidated matters are involved in various capacities in Vermont electoral politics and include a sitting legislator seeking re-election, candidates for future offices, political parties and political committees, and individual contributors and listeners. A number of individuals and advocacy groups were allowed to intervene as defendants in support of the Act. After a ten-day bench trial in May and June, 2000, the district court upheld many of the challenged provisions, but enjoined enforcement of the candidate spending

limits, the candidate contribution limits as applied to contributions from political parties, and the restriction on out-of-state contributions. App. 24a-26a.

All parties appealed the district court's decision to the Second Circuit. The case was argued there in May of 2001 and an initial 2-1 opinion was issued in August, 2002, in which the court upheld in large part both Act 64's contribution and expenditure limits. App. 95a. After Plaintiffs filed a motion for rehearing, the panel withdrew this opinion. *Id.* Two years later the same divided panel of the court of appeals again upheld most of the provisions of Act 64, but remanded to the district court to decide whether the expenditure limits were narrowly tailored to advance the State's interests. App. 96-97. Plaintiffs' motion for rehearing *en banc* was denied, 6-5, generating three separate dissenting opinions on the issue whether *en banc* hearing should have been granted. App. 315a. Petitioners now seek *certiorari* in this Court.

Vermont's Act 64

Spending Limits. Act 64 limits all candidate spending during a two-year election cycle.[1] 17 V.S.A. § 2805a. App. 6a-7a. Candidates for statewide office are restricted to varying amounts depending upon the position sought, with the candidate for governor limited to $300,000; the lieutenant governor to $100,000; and candidates for other statewide offices to $45,000. *See* 17 V.S.A. § 2805a(a)(1)-(3). App. 6a. Candidates for state senator and county office are limited to spending $4,000, with senate candidates permitted an additional $2,500 per seat in multi-seat districts. *Id.* Candidates for state

[1] Both the spending limits and the contribution limits adopted by Vermont depart from the federal model and the laws in virtually every other state because they apply on a two-year election cycle basis, rather than a per election basis – regardless of whether a candidate has a primary. *See* 17 V.S.A. §§2801(9), 2805(a), 2805a(a). App. 2a, 4a-5a, 6a. Only candidates for governor and lieutenant governor have the option of receiving public financing for their campaigns, provided they receive a certain number and amount of "qualifying contributions" and adhere to various other restrictions. *See* 17 V.S.A. § 2851-2856. App. 14a-19a.

representative in single-member districts can spend no more than $2,000, and those in two-member districts no more than $3,000. 17 V.S.A. § 2805a(a)(5). App. 6a.

Act 64 defines candidate "expenditures" to include a "payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value ... for the purpose of influencing an election." 17 V.S.A. § 2801(3). App. 1a. The breadth of this language is indisputable, and was chosen purposely to ensure that limits could not be avoided. Given its ordinary meaning the language includes the value of the use of personal phones, computers, offices, rooms in residences, paper, pencils, personal automobiles, etc. App. 211a. The evidence at trial and interpretative guidance provided by the Vermont Secretary of State, who is charged with administrating the Act, supports a broad reading of the term "expenditure." App. 211a-219a; Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont's Campaign Finance Law (January 9, 2001). *Id.* Act 64 thus treats all manner of typical grassroots campaign activities, such as a candidate's use of his/her own car and food provided by supporters at "meet the candidate" events, as campaign expenditures which count toward the applicable spending limits. Candidates, therefore, as well as their volunteers, may not drive their personal vehicles for campaign purposes without recording every mile driven and treating the costs of that driving as a campaign expenditure. App. 229a-232a, 241a-242a. The use of personal phone lines, the value of donated office space or professional services, and the costs of complying with the law are all considered to be "expenditures" under the Act. App. 225a-226a, 241a-242a. The spending limits — and the broad definition thereof — apply equally to candidates who exclusively use personal funds to finance their campaigns. 17 V.S.A. § 2805a(a). App. 6a.

Related Expenditures. Vermont's spending limits must be reviewed in the context of the "related expenditure" provision, which counts certain expenditures by third parties as both contributions to a candidate (subject to the applicable contribution limits) and expenditures by the candidate (thus

counted against the candidate's permissible budget). 17 V.S.A. § 2809. App. 8a-10a. Spending is "related" when it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." 17 V.S.A. § 2809(c). App. 8a. The broad definition of "expenditure" applies to related expenditures as well, and the language requiring intentional "facilitation," "solicitation" or "approval" has been given a broad interpretation by those charged with enforcing the act. App. 222a-223a, 308a-312a. Spending by individual supporters may be treated as a "related expenditure" when it exceeds $50. 17 V.S.A § 2809(b). App. 8a.

Act 64 creates a rebuttable presumption that expenditures made by political parties or political action committees are, in fact, "related" (i.e., coordinated) expenditures – thus counting as both contributions and candidate spending – if they primary benefit six or fewer candidates. Candidates may bring a petition in state court seeking determination as to whether particular third party expenditures should be considered related. 17 V.S.A. § 2809(e). App. 9a. Until such proceedings are resolved, however, candidates act at their peril. Furthermore, the cost of rebutting the statutory presumption is charged against the candidate's spending limit, which is apparently the case even if the candidate succeeds in establishing that the presumption does not apply. App. 225a-226a.

Contribution Limits. Act 64 also limits the size of contributions which candidates, political committees, and political parties may receive from a single source during a two-year election cycle. Candidates for state representative or local office may accept no more than $200 from a single source, political party or political action committee. 17 V.S.A. § 2805(a). App. 4a-5a. Slightly higher limits apply to candidates for state senate or county office ($300) and candidates for statewide office ($400). *Id.* Political action committees and political parties may accept no contribution greater than $2,000.

Id. For the purpose of all these contribution limits, a political party's state, county and local branch (and national and regional affiliates of the party) count as a single unit. 17 V.S.A. § 2801(5). App. 2a. These limits apply to all cash, in-kind, and "related" contributions, following the broad definitions described above. The single limit applies during an entire 2-year general election cycle whether or not the candidate faces a primary. Under these limits, the Democratic and Republican candidates for governor in Vermont can accept no more than $400 each (in cash, in kind or "related"), every two years, from their respective parties. 17 V.S.A. § 2805(a). App. 4a-5a.[2]

The Proceedings Below

The State's witnesses at trial opined that the State should be able to regulate campaign spending and political speech in much the way a public utility is regulated. App. 195a. In keeping with this philosophy, they lent their support at trial to pervasive regulation of campaign finance and a vision of an "old fashioned" politics where low cost, grass roots campaigning ruled the day. Defendants' witnesses repeatedly testified that they preferred "down home," "traditional," or "old fashioned" campaigns; yet, even these "old fashioned" methods of campaigning are subject to regulation – and limitation – under Act 64. App. 198a, 229a-232a.

Plaintiffs argued in response that it is not constitutionally appropriate for the State of Vermont to determine how, or how much, candidates should campaign. Under the broad definition of "expenditure" set forth in Act 64, nearly anything a candidate or contributor does will be counted towards the respective limits. Indeed, by defining the term so broadly, Vermont has side-stepped the debate over the

[2] Other provisions of Act 64's comprehensive scheme were not challenged by the petitioners, with one exception. Act 64 limits to 25% the amount of money candidates and political organizations can raise from out-of-state sources. 17 V.S.A. § 2805(c). App. 5a. The court of appeals unanimously affirmed the district court's ruling that this provision was unconstitutional. Accordingly, that issue is not presented by this petition.

relationship between money and speech in the campaign finance context. Once a candidate has reached the mandatory spending limit, she cannot even drive her own car to the village square to give a speech, or to go door-to-door campaigning. App. 197a. Relying on *Buckley*, plaintiffs argued below that it is for the candidate to determine how many mailings to send, how many doors to knock on, how many ads to run, and how often to drive to the village green to meet with voters.

Spending Limits. The district court enjoined enforcement of candidate spending limits on the strength of *Buckley*. The court of appeals divided 2-1 on this critical issue. In a decision directly at odds with the Sixth and Eighth circuits, *see* p. 13, *supra*, the panel majority concluded that this Court's holding in *Buckley* "does not operate as a *per se* bar to expenditure limits; rather, *Buckley* permits spending limits that are narrowly tailored to secure clearly identified and appropriately documented compelling governmental interests." App. 91a.

The majority found that Vermont's spending limits were supported by two government interests that it regarded as compelling, at least in tandem: limiting the time that candidates spend on fundraising and addressing the corrosive effect of public cynicism on the electoral process, which the Second Circuit characterized as a form of corruption. App. 144a-146a.

The majority next turned to the issue of whether the spending limits established by Act 64 allow for "effective advocacy." Using a test developed in the contribution limit context, the court found that the expenditure limits were not "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice." App. 152a-157a (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000)). Although the court of appeals recognized that there was conflicting evidence submitted at trial, it reviewed historical data from "average" races in which spending was reported under the prior law, and found many candidates spent within the limits of the new law. Thus, according to the majority below, most candidates would not be hampered by the new limits. App. 153a-154a.

Finally, the majority considered whether the Act's expenditure limits were narrowly tailored to advance the State's asserted interests. Because it could not determine whether other, less restrictive alternatives could achieve the same goals of preserving candidate time and diminishing public cynicism, the court remanded the case to the district court for further proceedings. App. 164a-168a.

Judge Winter forcefully dissented from both the majority's assessment of the evidence and its legal conclusions. App. 190a-194a. At the most fundamental level, he disagreed with the majority's view that the constitutionality of spending limits remains an open question after *Buckley*. App. 207a, 258a. Like the Sixth and Eighth Circuits, Judge Winter took the position that any re-examination of that issue must come from this Court. App. 258a-265a. In addition, he noted that the record did not, in fact, support the majority's assertion that fundraising in Vermont was unduly burdensome on candidates and officeholders. As Judge Winter recognized, it is easy to state that candidates spend too much time fundraising, but "it is not a testable proposition." App. 274a. That is because,

> [t]here is often no dividing line between donors and "ordinary citizens" who support a candidate or between fundraising and other campaign events. Meetings with supportive voters can often be described as either "fundraising" or as "person-to-person contact with voters" depending upon the point to be made.

Id. Moreover, as Judge Winter explained, incumbents and challengers are not similarly situated. Incumbents typically need less money to ensure re-election and can raise it more easily. Thus, what is perceived as a burden by one candidate may be perceived as a necessity by another.[3]

[3] Act 64 does attempt to ameliorate the incumbent's advantage by providing that incumbents running for re-election may only spend 85% or 90% of the standard limits, depending on the office sought. 17 V.S.A. § 2805a(c). App. 7a. The evidence at trial showed that the legislature chose these percentages arbitrarily, with no empirical basis. As Judge Winter pointed out in his dissent, the benefits of incumbency are not so easily overcome. App. 275a, 285a-286a.

Judge Winter also sharply criticized the majority's reliance on "average" spending to determine whether Vermont's spending limits would impair a candidate's ability to engage in "effective advocacy." As Judge Winter pointed out, the use of an average inevitably obscures the critical difference between contested races and uncontested races. An amount that may be sufficient for a candidate who is running unopposed may be grossly insufficient for a candidate who faces both a hotly contested primary and general election. Historical data shows that in contested elections significantly more money had been spent than would be allowed under the new limits. App. 236a-240a. As Judge Winter further observed, any comparison with historical spending rates needs to take into account the expanded definition of a covered expenditure under Act 64, including related expenditures, which the majority did not do.[4] App. 233a-234a. Fundamentally, Judge Winter pointedly disagreed with the majority that the test for effective advocacy developed in the contribution limit context – the "level of notice" standard - had any applicability to the constitutionality of spending limits. Where a *direct* restriction on speech is concerned, the First Amendment requires that a candidate be allowed to achieve more than just a "level of notice." App. 282a-285a.

And, unlike the majority, Judge Winter saw no need for a remand to explore less restrictive alternatives. That issue was decided by *Buckley*, which held that spending limits are not the least restrictive means of advancing the government's interest in preventing corruption or its appearance. 424 U.S. at 58-59. Judge Winter explained, moreover, that it was "self-evident"

[4] Witnesses at trial testified that the one-size-fits-all approach ignores geographic differences between districts, and a candidate with a physical disability might find traditional door-to-door campaigning difficult or impossible. Overriding issues of the day such as education finance or civil unions affect the manner, intensity, and cost of campaigns. App. 243a-245a. In the case of legislative candidates, legal assistance alone could literally exhaust all the expenditures allowable under the act. App. 235a.

that the State could, if it chose, promote its asserted interests through "a combination of public and private funding with low contribution limits." App. 193a-194a, 292a, 300a. In a sharply worded dissent from the *Denial of Rehearing En Banc*, five members of the court expressed their total agreement with Judge Winter's analysis that *Buckley* categorically rejects candidate expenditure limits and his conclusion that a remand was completely unnecessary. App. 323a, 328a. The dissenting judges were unusually critical of the majority's decision to ignore *Buckley*'s holding and to "provoke the Supreme Court into reconsidering its precedent by an aggressive (or fanciful) ruling on a vital subject." App. 341a.

Related Expenditures. Plaintiffs had no quarrel below with the basic premise that third party spending which is *actually* coordinated with a candidate can constitutionally be treated as a contribution to that candidate. Such a provision serves to avoid evasion of contribution limits that would otherwise apply. Plaintiffs challenged the presumption contained in § 2809(d), however, because it presumes that certain independent expenditures are coordinated and automatically treats them as expenditures by the candidate, placing the burden on the candidate (or contributor), at their peril, to disprove such treatment. *See* 17 V.S.A. §2809(e) (civil proceedings in state court); §2806 (criminal penalties). App. 7a-9a. The district court upheld the related expenditure provision of § 2809(d) as to contributions, relying on the theory that the presumption of coordination was rebuttable. App. 85a. The district court struck down the provision treating related expenditures as candidate expenditures after deciding that limits on candidate expenditures were *per se* unconstitutional. *Id.*

A majority of the court of appeals found no constitutional problem with the related expenditure provision as applied to contributions, much for the same reason found by the district court. Giving the statutory language a narrow reading, the court reasoned that a candidate could rebut the presumption of coordination in any enforcement proceeding by simply testifying that he or she had not "facilitated," "solicited," or

"approved" the expense. App. 184a. However, the majority remanded the question of related expenditures as it affects a candidate's spending limit, because the district court, having held spending limits unconstitutional, had not separately analyzed this issue. App. 168a.

In dissent, Judge Winter would have found § 2809(d) unconstitutional because it places an undue burden on candidates to disprove coordination of independent expenditures under a regime where the costs of defending oneself also counted against the limits. App. 222a-225a. Judge Winter also found the narrowing construction adopted by the majority to be contrary to advice given by Vermont's Secretary of State, who is charged with administering the law. App. 225a, 308a-312a. As such, the related expenditure provision would work untold mischief and chill much protected political speech by requiring candidates, parties, and supporters to speak and act only at their peril. App. 222a-225a, 289a.

Contribution Limits. The district court upheld the contribution limits as to individuals and political committees, finding that they advanced the State's interest in preventing corruption or its appearance. App. 52a-62a, 77a-80a. The court struck down the limits as applied to political parties, finding the $200, $300 and $400 amounts to be so low that they would essentially remove political parties from their traditional, historical role in elections. App. 72a-76a ("Such limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper."). The court of appeals, relying on *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 480-482 (2001) (*Colorado II*), felt there was no basis to distinguish between political parties and individuals or other organizations. App. 177a-181a. Accordingly, the court reversed the district court and upheld the constitutionality of all Act 64's contribution limits. App. 168a-181a.

In so holding, the court again relied on evidence from "average" contributions in prior elections. App. 170a. The court ignored plaintiffs' evidence that such historical averages are constitutionally inapt and would harm many candidates in

contested elections. The evidence at trial showed that a significant percentage of legislative candidates would be prevented from running effective campaigns under the $200 and $300 limits, and that the governor's race would be significantly impacted by the $400/every 2-year limit. The limits would have their greatest effect on seriously contested elections, and will harm challengers the most. Although Judge Winter did not dissent from the court's holding on contribution limits, Chief Judge Walker, in his opinion dissenting from the denial of rehearing *en banc*, was especially critical of the court's holding. He characterized the contribution limits as "laughably low... [and when considered in combination with expenditure limits]... are set so low and in such a fashion that only a desire to protect incumbents can explain them." App. 330a-331a. The majority wholly failed to consider the contribution limits in combination with the expenditure limits or to discuss how they are inevitably tied to the State's goal of curbing campaign spending.

The court of appeals similarly overlooked the fact that the district court's finding that limits this low still allowed for effective campaigning was inevitably tied to that court's ruling that the limits on party contributions to candidates were unconstitutional. The district court's order allowed political parties to make larger contributions to candidates and thus moderated, to some extent, the effect of the low individual contribution limits. App. 72a-76a.

REASONS FOR GRANTING THE WRIT

The decision below represents the first federal appellate ruling since *Buckley*, to uphold candidate expenditure limits. Its reasoning is inconsistent with a core holding in *Buckley*, which was left undisturbed by this Court's more recent holding in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 134 (2003). This case therefore raises issues of obvious national importance. If the constitutional rules governing political campaign financing are now to be changed, the responsibility lies with this Court. That is especially so because the decision

below also creates at least two separate circuit conflicts on vital issues of First Amendment law. Finally, the decision below approved contribution limits that are significantly lower than any this Court has ever approved, thus highlighting a continuing ambiguity about the appropriate First Amendment standards to apply in this context.

1. In upholding the candidate expenditure limits imposed by Vermont's campaign finance law, the Second Circuit assumed that the appropriate constitutional measuring stick is whether those limits "drive the sound of a candidate's voice below the level of notice." App. 153a. That text, borrowed from this Court's discussion of contribution limits, has never previously been used by any court to determine the appropriate amount of candidate speech in a political campaign. Nor should it be in a constitutional democracy committed to the principle that "debate on public issues should be uninhibited, robust, and wide-open..." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Under this Court's jurisprudence, contribution limits are justified by the State's compelling interest in avoiding corruption or the appearance of corruption. Once contribution limits are set at a suitable level, however, that interest is fully satisfied. Acknowledging that fact, the Second Circuit instead purported to justify Vermont's expenditure limits on the basis of an all encompassing definition of corruption attributed to unlimited campaign spending, and noted that the limits would relieve political candidates from the burden of excessive fundraising and provide incumbents with more time to focus on their official duties. Aside from the irony that the burden of political fundraising in Vermont has been most significantly enhanced by the unreasonably low contribution limits set by the legislature, the First Amendment does not permit the State to decide how much speech is enough for either candidates or voters. A remand should not be required to reaffirm this essential First Amendment value.

2. Because the decision below departs so dramatically from *Buckley*, it is not surprising that it also creates a direct conflict with at least two other circuit courts. Specifically, both the Sixth and the Tenth Circuits have held that, unless and until *Buckley* is overruled, it stands as a bar to the type of spending limits upheld by the Second Circuit in this case. *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998); *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004). In contrast to the Second Circuit, the Sixth and Tenth Circuits have each concluded as a matter of law that expenditure limits cannot be upheld under *Buckley* on the basis of the public's dissatisfaction with the electoral process or the demands on candidate time attributed to the increased need for fundraising. Only this Court can resolve that dispute.

3. The Second Circuit decision raises a separate conflict in the lower courts about the permissible use of statutory presumptions to automatically treat independent expenditures as contributions to – and expenditures by – a candidate. Although that issue was partially resolved in *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 609 (1996) ("*Colorado I*"), the Courts of Appeal are in conflict over whether the holding in that case can be avoided if the presumption is not strictly conclusive. The court below upheld Vermont's related expenditure provision – that automatically categorizes certain political party and political committee expenditures as coordinated – as a means of avoiding evasion of the State's contribution and expenditure limits. The court distinguished this Court's decision in *Colorado I* because the statute contains a provision that allows the party or candidate to rebut the presumption of coordination in any adversarial proceeding subsequently brought. However, in *Iowa Right to Life Committee, Inc v. Williams*, 187 F.3d 963 (8th Cir. 1999), the court struck down a far less onerous disclosure statute that automatically attributed independent expenditures to candidates unless the candidate filed a statement disavowing any affiliation with the expenditure. The decision below is thus in direct conflict with the Eighth Circuit

in *Williams* as to the application of *Colorado I* to presumptions of coordination.

4. The State of Vermont has also exceeded the bounds of permissible regulation of campaign contributions. The State's contribution limits are the lowest and most oppressive in the country. They arbitrarily apply on a per cycle basis and apply equally to political parties and political committees. One of the principal functions of these quintessential political organizations is to aggregate small contributions in order to finance candidates of their choice. These organizations are effectively and unnecessarily shut out of the electoral process, especially when the limits are considered in tandem with the related expenditure provision discussed above. The limits are especially onerous because all state and local political parties are considered a single entity for purposes of the statute.

The Second Circuit misread this Court's decision in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 as giving governments the green light to establish contribution limits at minimal – even nominal – levels so long as they allow for "effective advocacy." That misstates the standard by half. To be valid, the limits must first be "closely drawn" to match the State's interest in preventing corruption or its appearance. *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 162 (2003). The Vermont limits do not meet that standard because they were primarily adopted to correspond to expenditure limits that are themselves constitutionally suspect and unquestionably low. As a result, the contribution limits are set at unrealistic levels that will choke off many healthy sources of campaign funds from a candidate's supporters, including from the very same political organizations that have historically provided financing for candidates. Moreover, the adoption of limits on a per cycle basis will arbitrarily favor some candidates, particularly incumbents, over others. The decision below opens the door to unrestrained control over how political campaigns are financed and the role of political parties and committees. The Court should intervene to provide further guidance in this critical area of the electoral process.

I. This Case Raises Important Issues of National Significance Concerning the Scope of Permissible Regulation of Candidate Expenditures

Where core First Amendment principles are at stake, courts must bring a healthy skepticism to claims that candidates and non-candidates spend too much time and money on the political process. *Buckley*, 424 U.S. 1. The central holding in *Buckley* is that while it is permissible to limit campaign contributions, spending money on one's own speech must be permitted. Despite changes in the composition of the Court, that holding has stood the test of time. *See Colorado II*, 533 U.S. at 441.

Because expenditure limitations necessarily restrict political expression at the core of the electoral process and the First Amendment, they can survive a constitutional attack only if justified by a compelling State interest, *Colorado I*, 518 U.S. at 609; *Federal Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 251-52 (1986), and narrowly tailored to serve that interest, *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985). Conversely, limits on contributions have been treated as a less direct restraint on speech and subject to less exacting scrutiny. *See Shrink*, 528 U.S. at 378 (regulation of contributions must be "closely drawn to match a sufficiently important interest"). The doctrinal distinction between contributions and expenditures was affirmed in *Colorado II*, 533 U.S. at 441-442, and even more recently in *McConnell*, 540 U.S. at 134.

The basis for the distinction between expenditures and contributions was set forth in *Buckley*. "[R]estriction[s] on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. The *Buckley* court explained that it was subjecting the Act's expenditure limitations to "the exacting scrutiny applicable to limitations on

core First Amendment rights of political expression." *Id.* at 44-45. By contrast, the Court wrote in *Buckley*, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. Accordingly, contribution limits have come to be analyzed under a somewhat more deferential standard.

After drawing this distinction, the Court held that the danger of actual or perceived *quid pro quo* corruption that flows from a system of unregulated campaign contributions justified reasonable limits on contributions, but that the restrictions on candidate spending and independent expenditures could not be sustained by that interest or any of the other interests that the challenged statute purportedly advanced. Applying the exacting scrutiny that is applicable to government regulation of speech, 424 U.S. at 39, 44-45, the Court rejected the argument that expenditure limits were necessary, (1) to prevent corruption of candidates, or the appearance of corruption; (2) to reign in spiraling campaign costs; or (3) to "level the playing field." *Id.* at 39-57.

The Court's post-*Buckley* cases have adhered to the view that restrictions on candidate spending or independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and represent substantial, direct restraints on the quantity and diversity of political speech. For this reason, the Court's post-*Buckley* cases have consistently rejected attempts to regulate expenditures under various pretexts that have been asserted to allegedly preserve the integrity of the electoral process. See *Colorado I*, 518 U.S. at 615-19 (rejecting attempts to regulate political party expenditures to combat a substantial danger of corruption to the electoral system since lack of coordination between the party and candidate precluded the type of *quid pro quo* corruption thus far identified as the only justification sufficient to impose expenditure limits and despite purported danger of unlimited party spending); *National Conservative PAC*, 470 U.S. at 491-97 (political committee expenditures); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)

(striking down restriction on corporate expenditures to influence ballot measure).[5]

The panel opinion in this case departs from almost thirty years of Supreme Court precedent, and introduces an element of uncertainty into the regulation of campaign finance at a time when state and local governments are comprehensively re-examining the issue for the first time since *Buckley* was decided.

Even assuming that it is theoretically possible to justify some form of spending limits through the enactment of a law that is narrowly tailored to serve a compelling government interest, it is up to this Court to establish the constitutional boundaries of such regulation in an area that touches so directly on fundamental First Amendment freedoms.

The Second Circuit attempted to avoid the precedential import of *Buckley* by redefining the State's anti-corruption rationale in terms of public cynicism and the corrosive effects on the electoral process attributed to the need to raise campaign funds. The court asserted that *Buckley* had not fully considered this issue or the subsidiary issue of whether an expenditure law could be justified by the State's alleged interest in reducing the time spent on fundraising.

In fact, *Buckley* speaks much more directly to these issues than the Second Circuit acknowledged. The *Buckley* Court categorically rejected the argument that the spending of money legally raised by candidates poses a risk of *quid pro quo* corruption. 424 U.S. at 55-56. For this reason, the Second Circuit expressed serious doubt whether the State's anti-corruption interest is sufficient *by itself*. App. 135a. Despite its reservations, the court relied on this interest anyway by linking it with the State's separate interest in freeing candidates from the demands of fundraising attributable to the drive for campaign funds. It is doubtful, however, that that interest is sufficient to satisfy *Buckley*, or even that it is distinct from the

[5] The only exception thus far upheld by the Court for regulation of political expenditures involved political expenditures by corporations and labor unions. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell, supra*.

broader interest rejected in *Buckley* of controlling the costs of campaigns. Addressing arguments very similar to those raised here, the Court held that the interest in "reducing the allegedly skyrocketing costs of political campaigns" is not compelling or sufficient enough to justify restrictions on campaign spending. *Buckley*, 424 U.S. at 57.

> [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for government restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. (footnote omitted). See also *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (rejecting attempt to shape views of political party in an effort to bring party more to the center).[6] If that rule of law is now to be changed, it can only be done by this Court. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).[7]

[6] The prediction that spending limits will necessarily reduce the amount of time that candidates spend raising money is misguided. The expenditure limits have been adopted in tandem with the lowest contribution limits in the country. The majority below recognized that such low contribution limits would actually require candidates to spend more time fundraising, thus in a circular way justifying the Act's low spending limits as well. App. 150a-151a. In his dissent from denial of rehearing en banc, Chief Judge Walker recognized that a statute cannot be justified "based on problems that the statute itself creates." App. 331a.

[7] The assertion that expenditure limits will spare candidates the burden of fundraising does not apply to candidates who spend their own money. Rather, the principal rationale for limiting their expenditures seems to be a desire to "level the playing field." *Buckley* rejected this interest as justification for

Even if the *new* form of corruption relied upon below is distinct from the interests considered in *Buckley*, the court below compounded its error by unnecessarily remanding the case to determine whether the expenditure limits adopted by the legislature were narrowly tailored to serve those interests. *Buckley* has already established that spending limits are not the least restrictive means of advancing the State's interest in preventing corruption or its appearance. *Buckley*, 424 U.S. at 58-59. In reaching this conclusion, the Court considered a number of factors that apply equally in this case.

First, the government's interest was largely alleviated by the Act's contribution limits and disclosure requirements. *Id.* Vermont's contribution limits are the lowest in the country, and its disclosure laws are some of the strictest. The panel gives short shrift to this evidence and in effect concludes that the judgment made in *Buckley* about the efficacy of those less restrictive measures was wrong.

Second, *Buckley* specifically relied on data showing expenditure ceilings would have resulted in a reduction in the scope and spending of a number of House and Senate campaigns and substantially limited the overall expenditures of the two major party presidential candidates. *Id.* at 20 n. 21, 55 n. 62. The record in this case shows that the expenditure limits would have had at least as significant an impact in both legislative and statewide elections as the evidence established in *Buckley*. As emphasized in Judge Winter's dissent, the website for the Vermont Secretary of State shows very plainly that candidate expenditures have far exceeded the expenditure limits in the three state-wide elections that have been held since the law was first enacted. App. 235a-240a.[8] Petitioners do not

spending limits on the candidate's use of his or her own funds. 424 U.S. at 52-54.

[8] Although the district court enjoined enforcement of the expenditure limits, it adopted defendants' data showing how the limits would have effected previous elections in Vermont based on historical spending patterns. The court's finding focused only on average spending for legislative and statewide office. App. 235a-240a. The Court made no attempt to isolate or measure the impact of the limits on elections that were competitive or considered "in-play". App. 239a-240a. The cost of these elections deviates from the average considerably. In the last two gubernatorial elections in Vermont, the major party candidates reported expenditures in amounts that were double or almost triple Act 64's limits. App. 239a. Moreover, even a third party candidate for Governor exceeded the limits in the 2000 election. *Id.*

[9] Candidate spending is defined to include "anything of value," including a candidate's use of the family car or home phone, donated professional services, the value of favorable press coverage and the costs of complying with the law. App. 211a, 225a-226a.

believe that "effective advocacy" is or should be the governing standard for expenditure limits, but the expenditure limits adopted by Vermont and approved by the Second Circuit fail to reach even this minimal threshold for key competitive races.

The problem with Vermont's expenditure limits is exacerbated by the fact that the limits are adopted on a *per two-year cycle* basis. This approach fails to account for the cost of a contested primary, or worse, a candidate who spent up to his limit during the primary and who must face in the general election an opponent, especially an incumbent, who faced no primary opponent. Witnesses from both the Democratic and Republican parties testified that this provision may affect who runs in certain elections by creating incentives to avoid contested primaries. Finally, Vermont's limits have to be understood in the context of the broad definition of "expenditure" and the related expenditure provision contained in 17 V.S.A. § 2809(a)-(d).[9] The related expenditure provision not only counts third party expenditures that are *in fact* coordinated towards the candidate's expenditure ceiling, but also presumptively treats political party and political committee expenditures as contributions to the candidate and as candidate expenditures. App. 8a-9a. The presumption attaches if the expenditure benefits six or fewer candidates. Even though the candidate has no control over these expenditures, they count toward his or her spending ceiling. As such, the historical averages relied on by both the district court and the court of appeals grossly understate the true level of candidate "spending" as defined by Act 64. App. 233a-240a.

Above all else, the Court concluded in *Buckley* that "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on

behalf of his own candidacy" whether the source of his money is personal wealth or funds raised from legal contributions. *Buckley*, 424 U.S. at 54. The Court of Appeals' decision erroneously proceeds on the assumption that First Amendment protections for campaign speech have been watered down and that the judgments made in *Buckley* are no longer valid. Just the opposite is true. The Court's campaign finance jurisprudence on this issue has been remarkably constant and has unfailingly affirmed the holding in *Buckley*. The State is obviously dissatisfied with *Buckley*. Its quarrel is with this Court, however. Only this Court can provide the relief the State seeks.

II. The Second Circuit Decision Upholding Candidate Expenditure Limits and Upholding the Regulation of Independent Expenditures by Political Parties and Committees Is in Conflict with the Decisions of Other Courts of Appeals

A. The Circuit Conflict Involving Limits on Candidate Expenditures

Not surprisingly, the Second Circuit decision stands in direct conflict with recent decisions of the Sixth and Tenth Circuits. On the strength of the holding in *Buckley*, both courts categorically rejected the imposition of expenditure limits and the main arguments advanced by the State and adopted by panel below. See *Kruse*, 142 F.3d 907; *Homans*, 366 F.3d 900.

In *Kruse*, the court held that the erosion of public trust attributed to unlimited campaign spending cannot be severed as a 'new' form of corruption that the Supreme Court has not considered. *Kruse*, 142 F.3d at 916. The court held that any problems that flow from unlimited candidate spending are an outgrowth of the problems of actual or perceived corruption and the inequalities of private economic power rejected in *Buckley*, and therefore cannot provide separate justification for expenditure limits. *Id.* In contrast to the Second Circuit, the Sixth Circuit assumed that this Court had these considerations in mind when it observed, in *Buckley*, that "no governmental

interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by the ceiling on campaign expenditures." *Kruse*, 142 F.3d at 916.[10] *See Suster v. Marshall*, 149 F.3d 523, 532 (6th Cir. 1998) (expenditure limits imposed on judicial candidates could not be justified by State's interest in reducing the influence of otherwise lawful campaign contributions on judicial decisions). *See also, New Hampshire Right to Life Comm. v. Gardner*, 99 F.3d 8, 10-19 (1st Cir. 1996) (rejecting argument that independent expenditure limits could be justified by corrosive effect of money on the electoral process).

The Sixth Circuit in *Kruse* also rejected the contention that expenditure limits are needed to reduce the amount of time candidates spend raising money, and relatedly, to achieve the broader objective of "combating the demonstrated corrosive effects on the democratic process of uncontrollable campaign spending." 142 F.3d at 916. The Court reasoned that to the extent *Buckley* did not already foreclose the argument:

> The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns ... [B]ecause the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.

Id. at 916-917.

The panel decision below also conflicts with the decision of the Tenth Circuit Court of Appeals in *Homans v. City of Albuquerque, supra*. In *Homans*, spending limits were defended on the grounds that they were necessary to deter

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[10] While not separately addressed by the Supreme Court, one of the interests specifically advanced by the government in *Buckley* was the "alienation from and disillusionment in the election process by this country's citizens." *Kruse*, 142 F.3d at 916 (quoting from the Court of Appeals decision in *Buckley v. Valeo*, 519 F.2d 821, 913 (D.C. Cir. 1975)).

corruption, including the circumvention of contribution limits, and to free candidates from the demands of raising unlimited campaign funds. The court rejected the argument that the constitutionality of spending limits remains an open question to be determined by the facts of each case. The court held that "under *Buckley*, such restrictions cannot be supported as a matter of law." *Homans*, 366 F.3d at 914. In addition, the Tenth Circuit held that "prevention of corruption ... was specifically rejected by *Buckley* as a sufficient reason to limit direct campaign spending," and that the proffered interest of relieving elected officials of the demands of fundraising was "neither new nor compelling, nor are the spending caps tailored narrowly to serve them." *Id.* at 914.[11]

B. The Circuit Conflict Involving the Regulation of Independent Expenditures by Political Parties and Committees

Not content to limit candidates' own spending, Act 64 also seeks to encompass many independent expenditures within its spending and contribution limits. Pursuant to 17 V.S.A. 2809(d), expenditures by political parties or political committees that benefit six or fewer candidates are automatically treated as "related expenditures" and count toward the organization's contribution limits as well as the candidate's expenditure limit. App. 9a. The statutory presumption is not strictly conclusive and leaves open the possibility of showing that the expenditure was, in fact, *not* coordinated. Nevertheless, political organizations that spend as little as $200-$400 on completely independent expenditures act at their own peril if they spend (or contribute) an additional amount on behalf of a legislative or gubernatorial candidate.

Because of the constitutional difference between independent expenditures and "contributions," it is not

[11] Although Judge Tymkovich's opinion is styled as a concurrence, it was joined by Judge O'Brien and therefore constituted the majority opinion with regard to the substantive constitutional analysis of the spending limits at issue. *Homans*, 366 F.3d at 902, 914 n. 1.

constitutionally permissible for the State of Vermont to presume that the former is the latter by counting them as contributions. *Colorado I*, *supra.* The panel below distinguished that decision because of the availability of an affirmative defense allowing for rebuttal. The court upheld the related expenditure provision because it serves to prevent avoidance of the contribution limits – even though it cited no evidence that spending by political parties and political committees has been used in this fashion in Vermont. App. 183a-184a. The holding directly conflicts with the decision reached by the Eight Circuit Court of Appeals. *Iowa Right to Life Committee, Inc. v. Williams*, 187 F. 3d 963.

In *Williams* the court invalidated a disclosure statute that required candidates to file a statement within 72 hours disavowing any independent expenditure made on their behalf. If the candidate did nothing the expenditure was automatically presumed to be approved by candidate and treated as an expenditure by the candidate for purposes of disclosure. Relying on *Colorado I*, the court first observed that "simply calling an independent expenditure a 'coordinated expenditure,' or presuming such, cannot make it so." *Id.* at 967-68. The court then held that the fact that the candidate can disavow that the expenditure was coordinated or made without his knowledge does not cure the constitutional objection because an entirely independent expenditure is automatically presumed to be a coordinated expenditure. *Id.* at 967. The court held that the presumption "eliminat[es] the independent nature of the speech and thus diminish[es] its value." *Id.* In view of the provision's presumptive treatment of independent expenditures as coordinated, and absent any evidence that the statute is necessary to combat corruption, the court concluded that the statute was not narrowly tailored to serve that interest. *Id.* at 968.

The Vermont statute is significantly more restrictive than the disclosure statute considered in *Williams* because it places a direct restraint on speech by automatically counting independent expenditures as contributions and expenditures for purposes of the limits. The court's analysis below is limited to

its determination that the statute does little more than regulate coordinated expenditures and upholds it on the strength of this Court's decision in *Colorado II*. The panel does not even undertake the careful First Amendment analysis required to determine if the related expenditure provision is narrowly tailored to advance the State's interest.

The opinion acknowledges that "accused" candidates and political parties may be required to testify in an adversarial proceeding to rebut the presumption. App. 183a-184a. The court fails, however, to even discuss how the related expenditure provision burdens First Amendment rights or how the cost of defense would erode a candidate's available spending limit. App. 226a. The effect of the statutory presumption is that political organizations and candidates must act at their own peril when engaging in lawful campaign spending. A political party that independently sends out a mailing endorsing its candidate for Governor, and costing a modest $500, will have exceeded the allowable contribution limit and be completely foreclosed from making any additional expenditures or direct contributions. Moreover, both the party and the benefiting candidate are presumed to have committed a crime under Vermont law. The statute works to make all political party and political committee expenditures suspect in the eyes of prosecuting authorities and subject to scrutiny (and perhaps abuse) by overzealous authorities or opponents. The risk of prosecution "hovers over [candidates and political organizations] like the proverbial sword of Damocles'' and imposes a heavy burden on political speech. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 881 (1997). Moreover, the Act's presumption that the independent expenditures of political parties and committees are coordinated is by definition not narrowly tailored since the statute's purpose is already served adequately by the same statutory provision that properly treats *coordinated* expenditures as contributions. 17 V.S.A. § 2809(c). App. 8a. More importantly, the opportunity to rebut the presumption does not constitute the sort of narrow tailoring that would save an otherwise unconstitutional statute, particularly in the absence of any evidence of improper

coordination. *See, e.g., Reno v. American Civil Liberties Union,* 521 U.S. at 881.

Vermont is attempting to do indirectly what is clearly prohibited from doing directly – curtail expenditures made totally independently of the candidate and his campaign. The majority opinion brushes aside this claim and the related allegation that the law will "chill" political organizations from engaging in protected speech. Individuals and organizations wishing to engage in expenditures may be reluctant to do so knowing that if they cannot successfully rebut the presumption, they will have violated the state's campaign finance laws and be subject to criminal prosecution. When political organizations and candidates are challenged under section 2809, they will be required to spend their limited resources in court. *See Massachusetts Citizens for Life,* 479 U.S. 238. These resources, of course, are counted against the organization's contribution limits and the candidate's expenditure limits. Moreover, for all the reasons advanced in Judge Winter's dissenting opinion, the related expenditure provision is fraught with vagueness, uncertainty, and the potential for untold mischief. App. 223a-226a. In the final analysis, the failure to respond to these failings in the law ignores the important First Amendment freedoms that this statute jeopardizes.

III. This Case Raises Important Issues of National Significance Concerning the Scope of Permissible Regulation of Campaign Contributions

The framework for evaluating contribution limits requires the State to demonstrate that the restriction is "closely drawn to match a sufficiently important interest." *Shrink*, 528 U.S. at 387-388. This standard requires two key factual determinations. First of all, a limit can be valid only if it is closely drawn to serve a compelling state interest in combating "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt." *Id.* at 389-395. Secondly, the limit must not be so low that it prevents candidates from

amassing the resources needed for effective advocacy. *Id.* at 397.

Unlike contribution limits that have been upheld elsewhere, Vermont's were adopted in combination with an overly zealous legislative attempt to impose mandatory spending limits on candidates. As a result, the contribution limits are established at levels that directly correspond to expenditure limits which themselves are unrealistically low. In an opinion dissenting from the denial of rehearing *en banc*, Chief Judge Walker characterizes the contribution limits as "laughably low... [and when considered in combination with expenditure limits]... are set so low and in such a fashion that only a desire to protect incumbents can explain them." App. at 330a-331a. Some candidates are limited to as little as $200 from any contributor for an entire two-year election cycle – even the candidate's political party, meaning that a contributor who gives her favorite candidate $200 in a hotly contested primary is prohibited from providing any new assistance to the candidate in the general election. Even gubernatorial candidates can accept only $400 every two years. Contributions from political parties are restricted still further as all the state, county, and town committees of a political party are treated as a single entity. Hence, the entire Republican, Democratic, or Libertarian Parties of Vermont, with all their local committees, may only give $400 each to their gubernatorial nominee.

The record does not disclose any evidence to justify Vermont's exceedingly low contribution limits. The State's evidence and the district court's findings are extremely thin, and miss the mark by failing to link the supposed problems with large contributions. While the State need not show money for vote chicanery, it must at least make a case arising from the broader interest in the "threat [of] politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389. No such case was made here. The legislative findings and trial testimony relied upon by the State loudly bemoan the evils of large contributions and the public's suspicion of them, but very few examples are provided. Most incidents involved

contributions that were low enough to have been permitted by these new limits. Despite having compiled extensive contribution data covering three election cycles, the State never identified the phantom contributors allegedly poisoning the system with large contributions – much less established a pattern or practice of corrosive large contributions.

The record amply demonstrates that these limits would radically reduce the funding of political campaigns. By setting its limits so low and applying them so broadly, Vermont makes it difficult for many candidates to raise necessary finances. By treating political parties and PACs as if they were individual contributors, moreover, the limits trample the weightier associational interests at stake when restricting the rights of individuals who come together for a common purpose. Instead of reigning in the special interests and industry groups that the public is concerned with, Vermont has taken a sledge hammer to the problem that will choke off "clean" money from the very sources that pose little or no risk of corruption and of which the public is far less suspicious. Nowhere will the impact be harder felt than in those elections where the candidate relies on these contributions for "seed money" to jumpstart his or her campaign or for a last hour infusion of cash in a close election where an additional mailing or media spot might make the difference. Political parties and House/Senate election committees uniquely fill this void. There is simply no justification for all but shutting these organizations from the process.

The panel opinion ignores this evidence and instead relies on the District Court findings that the reduced limits will not impede the ability of the "average" candidate to amass the funds necessary to finance his or her campaign. App. 169a-171a. As plaintiffs have emphasized throughout, the profile of the average candidate relied upon by the State and endorsed by the lower court includes the dozens of candidates who raised little money because they ran unopposed or faced nominal opposition. Relying on the contributions made to these candidates skews the average, and masks the severe impact upon the candidates who actually need to communicate with

their constituents. It is the competitive candidacies that are most affected by these limits, and these are the ones where a full debate of the issues is most critical. Each year, a handful of competitive elections determine the balance of power in the legislature.

Thus, while the limits may not effect all elections in all districts, it is hard to argue that the limits will not seriously impact candidates in statewide races and many House and Senate elections. The limits will seriously hamper candidates with contested primaries, and may change political behavior drastically by affecting who runs for office in a given year. The costs of television, radio and newspaper advertising have increased the expense of running an effective campaign and, Defendant's vision of Vermont politics -- that of "old fashioned", grassroots campaign methods -- may be enticing, but such vision cannot be legally imposed on all candidates. Vermont's new limits prevent candidates from "amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21, and undermine "the potential for robust and effective discussion of candidates and campaign issues . . . ." *Id.* at 29.

CONCLUSION

For the reasons stated above, the Court should grant *certiorari*.

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APPENDIX A

§ 2801. Definitions

As used in this chapter:

(1) "Candidate" means an individual who has taken affirmative action to become a candidate for state, county, local or legislative office in a primary, special, general or local election. An affirmative action shall include one or more of the following:

(A) accepting contributions or making expenditures totalling $500.00 or more; or

(B) filing the requisite petition for nomination under this title or being nominated by primary or caucus; or

(C) announcing that he seeks an elected position as a state, county or local officer or a position as representative or senator in the general assembly.

(2) "Contribution" means a payment, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid to a person for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates in any election, but shall not include services provided without compensation by individuals volunteering their time on behalf of a candidate, political committee or political party. For purposes of this chapter, "contribution" shall not include a personal loan from a lending institution.

(3) "Expenditure" means a payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates.

(4) "Political committee" or "political action committee" means any formal or informal committee of two or more individuals, not including a political party, which receives contributions or makes expenditures of more than $500.00 in

any one calendar year for the purpose of supporting or opposing one or more candidates, influencing an election or advocating a position on a public question, in any election or affecting the outcome of an election.

(5) "Political party" means a political party organized under chapter 45 of this title or any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party.

(6) "Single source" means an individual, partnership, corporation, association, labor organization or any other organization or group of persons which is not a political committee or political party.

(7) "Election" means the procedure whereby the voters of this state or any of its political subdivisions select a person to be a candidate for public office or fill a public office, or to act on public questions including voting on constitutional amendments. Each primary, general, special, run-off or local election shall constitute a separate election.

(8) "Public question" means an issue that is before the voters for a binding decision.

(9) "Two-year general election cycle" means the 24-month period that begins the day after a general election.

(10) "Full name" means an individual's full first name, middle name or initial, if any, and full legal last name, making the identity of the person who made the contribution apparent by unambiguous reference. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1987, No. 263 (Adj. Sess.), § 1; 1997, No. 64, § 5, eff. Nov. 4, 1998.)

§ 2802. Checking account; treasurer

Candidates who have made expenditures or received contributions of $500.00 or more and political committees shall be subject to the following requirements:

(1) All expenditures shall be paid by check from a single checking account in a single bank publicly designated by the candidate or political committee.

(2) Each candidate and each political committee shall name a treasurer, who may be the candidate or spouse, who is responsible for maintaining the checking account. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below.)

§ 2803. Campaign reports; forms; filing

(a) The secretary of state shall prescribe and provide a uniform reporting form for all campaign finance reports. The reporting form shall be designed to show the following information:

(1) the full name, town of residence and mailing address of each contributor who contributes an amount in excess of $100.00, the date of the contribution, and the amount contributed;

(2) the total amount of all contributions of $100.00 or less and the total number of all such contributions;

(3) each expenditure listed by amount, date, to whom paid and for what purpose;

(4) the amount contributed or loaned by the candidate to his or her own campaign during the reporting period; and

(5) each debt or other obligation, listed by amount, date incurred, to whom owed and for what purpose, incurred during the reporting period.

(b) The form shall require the reporting of all contributions and expenditures accepted or spent during the reporting period and during the campaign to date and shall require full disclosure of the manner in which any indebtedness is discharged or forgiven. Contributions and expenditures for the reporting period and for the campaign to date also shall be totalled in an appropriate place on the form. The form shall contain a list of the required filing times so that the person filing may designate for which time

period the filing is made. Contributions and expenditures received or spent during the 48 hour period prior to the filing deadline shall be reported on the next report.

(c) The form described in this section shall contain language of certification of the truth of the statements and places for the signature of the candidate and his treasurer.

(d) All reports filed under this section shall be retained in an indexed file by the official with whom the report is filed and shall be subject to the examination of any person.

(e) Disclosure shall be limited to the information required by this section. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1985, No. 198 (Adj. Sess.), §§ 14, 15; 1987, No. 263 (Adj. Sess.), § 2; 1997, No. 64, § 11, eff. Nov. 4, 1998.)

§ 2804. Surplus campaign funds

(a) No member of a political committee which has surplus funds after all campaign debts have been paid shall convert the surplus to personal use.

(b) No candidate who has surplus funds after all campaign debts have been paid shall convert the surplus to personal use, other than to reduce personal campaign debts.

(c) The "final report" of a candidate shall indicate the amount of the surplus and how it has been or is to be liquidated. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below.)

§ 2805. Limitations of contributions

(a) A candidate for state representative or local office shall not accept contributions totaling more than $200.00 from a single source, political committee or political party in any two-year general election cycle. A candidate for state senator or county office shall not accept contributions totaling more than $300.00 from a single source, political committee or political party in any two-year general election cycle. A candidate for the office of governor, lieutenant governor, secretary of state, state treasurer, auditor of

accounts, or attorney general shall not accept contributions totaling more than $400.00 from a single source, political committee or political party in any two-year general election cycle. A political committee, other than a political committee of a candidate, or a political party shall not accept contributions totaling more than $2,000.00 from a single source, political committee or political party in any two-year general election cycle.

(b) A single source, political committee or political party shall not contribute more to a candidate, political committee or political party than the candidate, political committee or political party is permitted to accept under subsection (a) of this section.

(c) A candidate, political party or political committee shall not accept, in any two-year general election cycle, more than 25 percent of total contributions from contributors who are not residents of the state of Vermont or from political committees or parties not organized in the state of Vermont.

(d) A candidate shall not accept a contribution in excess of $50.00 unless made by check.

(e) A candidate, political party or political committee shall not accept a contribution which is not directly from the contributor, but was transferred to the contributor by another person for the purpose of transferring the same to the candidate, or otherwise circumventing the provisions of this chapter.

(f) This section shall not be interpreted to limit the amount a candidate or his or her immediate family may contribute to his or her own campaign. For purposes of this subsection, "immediate family" means individuals related to the candidate in the first, second or third degree of consanguinity.

(g) The limitations on contributions established by this section shall not apply to contributions made for the purpose

of advocating a position on a public question, including a constitutional amendment.

(h) For purposes of this section, the term "candidate" includes the candidate's political committee. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1987, No. 263 (Adj. Sess.), § 3, eff. Jan. 1, 1989; 1997, No. 64, § 6, eff. Nov. 4, 1998.)

§ 2805a. Campaign expenditure limitations; amounts

(a) The following campaign expenditure limitations shall apply to all candidates, for all primary, general and local elections, whether or not a candidate accepts Vermont campaign finance grants under subchapter 6 of this chapter, is financing his or her campaign from private contributions, or from the candidate's own resources or that of his or her immediate family.

(1) A candidate for governor shall limit campaign expenditures to no more than $300,000.00 in any two-year general election cycle.

(2) A candidate for lieutenant governor shall limit campaign expenditures to no more than $100,000.00 in any two-year general election cycle.

(3) A candidate for secretary of state, state treasurer, auditor of accounts or attorney general shall limit campaign expenditures to no more than $45,000.00 in any two-year general election cycle.

(4) A candidate for state senator or county office shall limit campaign expenditures to no more than $4,000.00 plus, in the case of state senator, an additional $2,500.00 for each additional seat in the senate district, in any two-year general election cycle.

(5) A candidate for state representative in a single-member district shall limit campaign expenditures to no more than $2,000.00, and in a two-member district to no more than $3,000.00, in any two-year general election cycle.

(b) Recognizing the jurisdiction of the Congress of the United States to enact expenditure limitations and campaign finance reforms for candidates for federal office, the general assembly of the state of Vermont expects candidates for the United States House of Representatives and Senate to observe the contribution and expenditure limitations that apply to candidates for the office of governor.

(c) If a candidate for the office of governor, lieutenant governor, secretary of state, state treasurer, auditor of accounts or attorney general is an incumbent of the office being sought, the candidate shall be permitted to expend only 85 percent of the amount allowed for that office under this section. If a candidate for the general assembly is an incumbent of the office being sought, the candidate shall be permitted to expend only 90 percent of the amount allowed for that office under this section.

(d) For purposes of this section, the term "candidate" includes the candidate's political committee. (Added 1997, No. 64, § 7, eff. Nov. 4, 1998.)

§ 2806. Penalties

(a) A person who knowingly and intentionally violates a provision of subchapters 2 through 4 of this chapter shall be fined not more than $1,000.00 or imprisoned not more than six months or both.

(b) A person who violates any provision of this chapter shall be subject to a civil penalty of up to $10,000.00 for each violation and shall refund the unspent balance of Vermont campaign finance grants received, if any, calculated as of the date of the violation.

(c) In addition to the other penalties herein provided, a state's attorney or the attorney general may institute any appropriate action, injunction, or other proceeding to prevent, restrain, correct or abate any violation of this chapter. (Added 1981, No. 197 (Adj. Sess.), § 1; amended

1991, No. 156 (Adj. Sess.), § 3, eff. Jan. 1, 1993; 1997, No. 64, § 3.)

§ 2807. New campaign accounts

Candidates who choose to open a new campaign account for public-office may close out their former campaign by filing a final report with the secretary of state converting all debts and assets to the new campaign. This final report shall disclose all contributions and expenditures and the disposition of all debts and assets attributable to the former campaign as of the date of the filing of the final report. (Added 1987, No. 263 (Adj. Sess.), § 4.)

§ 2808. Preparation of list of campaign expenditures

Not later than five days after receipt of campaign finance reports under this chapter, the secretary of state shall prepare a list of the accumulated amount of expenditures reported by each candidate. (Added 1991, No. 156 (Adj. Sess.), § 2, eff. Jan. 1, 1993.)

§ 2809. Accountability for related expenditures

(a) A related campaign expenditure made on a candidate's behalf shall be considered a contribution to the candidate on whose behalf it was made.

(b) A related campaign expenditure made on a candidate's behalf shall be considered an expenditure by the candidate on whose behalf it was made. However, if the expenditure did not exceed $50.00, the expenditure shall not be considered an expenditure by the candidate on whose behalf it was made.

(c) For the purposes of this section, a "related campaign expenditure made on the candidate's behalf" means any expenditure intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee.

(d) An expenditure made by a political party or by a political committee that recruits or endorses candidates, that primarily benefits six or fewer candidates who are associated with the political party or political committee making the expenditure, is presumed to be a related expenditure made on behalf of those candidates. An expenditure made by a political party or by a political committee that recruits or endorses candidates, that substantially benefits more than six candidates and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity shall not be presumed to be a related expenditure made on a candidate's behalf. In addition, an expenditure shall not be considered a "related campaign expenditure made on the candidate's behalf" if all of the following apply:

(1) The expenditures were made in connection with a campaign event whose purpose was to provide a group of voters with the opportunity to meet the candidate personally.

(2) The expenditures were made only for refreshments and related supplies that were consumed at that event.

(3) The amount of the expenditures for the event was less than $100.00.

(e) A candidate may seek a determination that an expenditure is a related expenditure made on behalf of an opposing candidate by filing a petition with the superior court of the county in which either candidate resides. Within 24 hours of the filing of a petition, the court shall schedule the petition for hearing. Except as to cases the court considers of greater importance, proceedings before the superior court, as authorized by this section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way. The findings and determination of the court shall be prima facie evidence in any proceedings brought for violation of this chapter.

(f) The secretary of state may adopt rules necessary to administer the provisions of this section. (Added 1997, No. 64, § 8, eff. Nov. 4, 1998.)

§ 2810. Candidate information publication; on-line database

(a) For each two-year general election cycle, the secretary of state shall develop and continuously update a publicly accessible campaign database. The database shall contain at least the following information for all candidates for statewide and county office and for the general assembly: for candidates receiving public financing grants, the amount of each grant awarded; the information contained in campaign finance reports filed under this chapter; and all reports of mass media activity expenditures filed under section 2883 of this title. The database shall also include campaign finance reports filed by candidates for federal office. The information in the database, together with any biographical sketches and position statements submitted to the secretary of state by such candidates, shal. be made available to the public through the Vermont state home page on-line service, or through printed reports from the secretary in response to a public request within 14 days of the date of the request.

(b) Any candidate for statewide office and any candidate for federal office qualified to be on the ballot in this state may submit to the secretary of state a photograph, biographical sketch and position statement of a length and format specified by the secretary for the purposes of preparing a candidate information publication. Without making changes in the material presented, the secretary shall prepare a candidate information publication for statewide distribution prior to the general election, which includes the candidates' photographs, biographies and position statements, a brief explanation of the process used to obtain candidate submissions, and, with respect to offices for which public financing is available, an indication of which

candidates are receiving Vermont campaign finance grants and which candidates are not receiving Vermont campaign finance grants. The secretary shall prepare, publish and distribute the candidate information publication throughout the state no later than one week prior to the general election. The secretary shall also seek voluntary distribution of the candidate information publication in weekly and daily newspapers and other publications in the state. The candidate information publication shall also be available in large type, audiotape and Internet versions. (Added 1997, No. 64, § 9, eff. Nov. 4, 1998.)

§ 2810a. Administration

The secretary of state shall administer this chapter and shall perform all duties required under this chapter. The secretary may employ or contract for the services of persons necessary for performance of these duties. (Added 1997, No. 64, § 10.)

§ 2811. Campaign reports; candidates for state office, the general assembly, political committees and political parties

(a) Each candidate for state office, each candidate for the general assembly who has made expenditures or received contributions of $500.00 or more, and each political committee and each political party required to register under section 2831 of this title shall file with the secretary of state campaign finance reports 40 days before the primary election and on the 25th of each month thereafter and continuing to the general election.

(b) At any time, but not later than 40 days following the general election, a candidate for state office and each candidate for the general assembly who has made expenditures or received contributions of $500.00 or more shall file with the secretary of state a "final report" which lists a complete accounting of all contributions and expenditures, and disposition of surplus, and which shall constitute the termination of his or her campaign activities.

(c) A political committee or political party shall file a campaign finance report not later than 40 days following the general election. At any time, a political committee or a political party may file a "final report" which lists a complete accounting of all contributions and expenditures and which shall constitute the termination of its campaign activities.

(d) In odd-numbered years campaign finance reports shall be filed on July 15.

(e) Each candidate for the general assembly required to file campaign finance reports under this section shall also file such reports with the clerk of the candidate's respective senate or house district. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1997, No. 64, § 12, eff. Nov. 4, 1998.)

§ 2821. Campaign reports; county office candidates

(a) Each candidate for county office who has made expenditures or accepted contributions of $500.00 or more shall file campaign finance reports with the officer with whom his or her nomination papers are filed as follows:

(1) 10 days before the primary election;

(2) 10 days before the general election;

(3) further campaign reports shall be filed on the 15th day of July and annually thereafter or until all contributions and expenditures have been accounted for and any indebtedness and surplus have been eliminated.

(b) Within 40 days after the general election, each candidate for county office who has made expenditures or accepted contributions of $500.00 or more shall file a "final report" which lists a complete accounting of all contributions and expenditures, and disposition of surplus, and which shall constitute the termination of his or her campaign activities.

(c) Copies of reports filed under this section shall be forwarded by the officer to the secretary of state within five days of receipt. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1987, No. 263 (Adj.

Sess.), §§ 5, 6; amended 1997, No. 64, § 13, eff. Nov. 4, 1998.)

§ 2822. Campaign reports; local candidates

Each candidate for local office who has made expenditures or accepted contributions of $500.00 or more shall file with the officer with whom his nomination papers are filed campaign finance reports ten days before and ten days after the local election. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below.)

§ 2823. Nonfiling

The failure of a legislative, county or local candidate to file a campaign finance report shall be deemed an affirmative statement that the candidate has not accepted contributions or made expenditures of $500.00 or more. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below.)

§ 2831. Campaign reports; political committees and parties

(a) Each political committee and each political party which has accepted contributions or made expenditures of $500.00 or more shall register with the secretary of state stating its full name and address, the name of its treasurer, and the name of the bank in which it maintains its campaign checking account within ten days of reaching the $500.00 threshold.

(b) A political committee or political party which has accepted contributions or made expenditures of $500.00, or more, for the purpose of influencing a local election or supporting or opposing one or more candidates in a local election shall, in addition to other filings required by this chapter, file campaign finance reports ten days before and ten days after the local election with the clerk of the municipality in which the election is held and with the secretary of state. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1985, No. 198

(Adj. Sess.), §§ 16, 17; 1997, No. 64, § 14, eff. Nov, 4, 1998.)

§ 2832. Filing with federal election commission

A political committee or political party may satisfy the filing requirements of this subchapter and subchapter 2 of this chapter by filing with the secretary of state a copy of that portion of the campaign finance reports applicable to candidates seeking election in this state which the committee or party has filed with the Federal Election Commission and by designating an in-state agent in the report. (Added 1981, No. 197 (Adj. Sess.), § 1, eff. date, see note set out below; amended 1997, No. 64, § 15, eff. Nov. 4, 1998.)

§ 2851. Definitions

As used in this subchapter:

(1) "Affidavit" means the Vermont campaign finance affidavit required under section 2852 of this title.

(2) "General election period" means the period beginning the day after the primary election and ending the day of the general election.

(3) "Primary election period" means the period beginning the day after primary petitions must be filed under section 2356 of this title and ending the day of the primary election.

(4) "Vermont campaign finance qualification period" means the period beginning February 15 of each even-numbered year and ending on the date on which primary petitions must be filed under section 2356 of this title.

(5) "Secretary" means the secretary of state. (Added 1997, No. 64, § 2, eff. Nov. 4, 1998.)

§ 2852. Filing of Vermont campaign finance affidavit

(a) A candidate for the office of governor or lieutenant governor who intends to seek Vermont campaign finance grants from the Vermont campaign fund shall file a Vermont campaign finance affidavit on the date on or before which

primary petitions must be filed, whether the candidate seeks to enter a party primary or is an independent candidate.

(b) The secretary of state shall prepare a Vermont campaign finance affidavit form, informational materials on procedures and financial requirements and notification of the penalties for violation of this subchapter. The Vermont campaign finance affidavit shall set forth the conditions of receiving grants under this subchapter and provide space for the candidate to agree that he or she will abide by such conditions and all expenditure and contribution limitations, reporting requirements, and other provisions of this chapter. The affidavit shall also state the candidate's name, legal residence, business or occupation, address of business or occupation, party affiliation, if any, the office sought and whether the candidate intends to enter a party primary. The affidavit shall also contain a list of all the candidate's qualifying contributions together with the name and town of residence of the contributor and the date each contribution was made. The affidavit may further require affirmation of such other information as deemed necessary by the secretary for the administration of this subchapter. The affidavit shall be sworn and subscribed to by the candidate. (Added 1997, No. 64, § 2, eff. Nov. 4, 1998.)

§ 2853. Vermont campaign finance grants; conditions

(a) A person shall not be eligible for Vermont campaign finance grants if, during a two-year general election cycle, he or she becomes a candidate by accepting contributions totaling $500.00 or more or by making expenditures totaling $500.00 or more prior to February 15 of the general election year.

(b) A candidate who accepts Vermont campaign finance grants, shall:

(1) Not solicit, accept or expend any contributions except qualifying contributions, Vermont campaign finance grants and contributions authorized under section 2855 of this title,

which contributions may be solicited, accepted or expended only in accordance with the provisions of this subchapter.

(2) Deposit all qualifying contributions, Vermont campaign finance grants and any contributions accepted in accordance with the provisions of section 2855 of this title in a federally insured noninterest bearing checking account.

(3) Not later than 40 days after the general election, deposit in the Vermont campaign fund, after all permissible expenditures have been paid, the balance of any amounts remaining in the account established under subdivision (2) of this subsection. (Added 1997, No. 64, § 2, eff. Nov. 4, 1998.)

§ 2854. Qualifying contributions

(a) In order to qualify for Vermont campaign finance grants, a candidate for the office of governor or lieutenant governor must obtain during the Vermont campaign finance qualification period the following amount and number of qualifying contributions for the office being sought:

(1) For governor, a total amount of no less than $35,000.00 collected from no fewer than 1,500 qualified individual contributors making a contribution of no more than $50.00 each.

(2) For lieutenant governor, a total amount of no less than $17,500.00 collected from no fewer than 750 qualified individual contributors making a contribution of no more than $50.00 each.

(b) No candidate may accept more than one qualifying contribution from the same contributor and no contributor may make more than one qualifying contribution to the same candidate in any Vermont campaign finance qualification period. For the purpose of this section, a qualified individual contributor means an individual who is registered to vote in Vermont. No more than 25 percent of the total number of qualified individual contributors may be residents of the same county.

(c) Each qualifying contribution must indicate the name and town of residence of the contributor, the date received, and be acknowledged by the signature of the contributor.

(d) A candidate may retain and expend qualifying contributions obtained under this section. A candidate may expend the qualifying contributions for the purpose of obtaining additional qualifying contributions and may expend the remaining qualifying contributions during the primary and general election periods. Amounts expended under this subsection shall be considered expenditures for purposes of this chapter. (Added 1997, No. 64, § 2, eff. Nov. 4, 1998.)

§ 2855. Vermont campaign finance grants; amounts; timing

(a) To the extent funds are available, the secretary of state shall make grants from the Vermont campaign fund in separate grants for the primary and general election periods to candidates who have qualified for Vermont campaign finance grants under this subchapter.

(b) Whether a candidate has entered a primary or is an independent candidate, Vermont campaign finance grants shall be in the following amounts:

(1) For governor, $75,000.00 in a primary election period and $225,000.00 in a general election period, provided that the grant for a primary election period shall be reduced by an amount equal to the candidate's qualifying contributions.

(2) For lieutenant governor, $25,000.00 in a primary election period and $75,000.00 in a general election period, provided that the grant for a primary election period shall be reduced by an amount equal to the candidate's qualifying contributions.

(3) A candidate who is an incumbent of the office being sought shall be entitled to receive a grant in an amount equal

to 85 percent of the amount listed in subdivision (1) or (2) of this subsection.

(c) In an uncontested general election and in the case of a candidate who enters a primary election and is unsuccessful in that election, an otherwise eligible candidate shall not be eligible for a general election period grant. However, such candidate may solicit and accept contributions and make expenditures as follows: contributions shall be subject to the limitations of section 2805 of this title and expenditures shall be limited to an amount equal to the amount of the grant set forth in subsection (b) of this section for the general election for that office.

(d) Grants awarded in a primary election period, but not expended by the candidate in the primary election period, may be expended by the candidate in the general election period.

(e) If the Vermont campaign fund contains insufficient revenues to provide Vermont campaign finance grants to all candidates under this section, the available funds shall be distributed proportionately among all qualifying candidates. If grants are reduced under this subsection, a candidate may solicit and accept additional contributions equal to the amount of the difference between the amount of the Vermont campaign finance grants authorized and the amount received under this section. Additional contributions authorized under this subsection shall be governed by the provisions of sections 2805 and 2853 of this title.

(f) Vermont campaign finance grants for a primary election period shall be paid to qualifying candidates within the first ten business days of the primary election period. Vermont campaign finance grants for a general election period shall be paid to qualifying candidates during the first ten business days of the general election period. (Added 1997, No. 64, § 2, eff. Nov. 4, 1998.)

§ 2856. Vermont campaign fund

(a) A Vermont campaign fund is created for distribution of Vermont campaign finance grants to candidates for the offices of governor and lieutenant governor. The fund shall be administered by the state treasurer, and payments shall be made under warrants issued by the secretary of state.

(b) The fund shall consist of revenues from the following sources:

(1) Any amounts required to be deposited in the fund under section 2853 of this title.

(2) All penalties and fines levied for violations of this chapter.

(3) Forty percent of the amounts paid as annual report fees by domestic corporations under subdivision 1.22(a)(17) of Title 11A and 33 percent of the amounts paid as annual report fees by foreign corporations under subdivision 1.22(a)(16) of Title 11A.

(4) All amounts collected from the tax on lobbying expenditures imposed under 2 V.S.A. § 264a.

(5) All amounts collected under section 5862c of Title 32, the Vermont campaign fund add-on.

(6) Any gifts received by the fund.

(7) Any amounts appropriated to the Vermont campaign fund by act of the general assembly.

(c) All principal and interest remaining in the fund at the close of any fiscal year shall not revert but shall remain in the fund for use in succeeding fiscal years. (Added 1997, No. 64, § 2, eff. Jan. 1, 1998.)

§ 2881. Definitions

As used in this subchapter, "political advertisement" means any communication, including communications published in any newspaper or periodical or broadcast on radio, television or over any public address system, placed on any billboards, outdoor facilities, buttons or printed material attached to

motor vehicles, window displays, posters, cards, pamphlets, leaflets, flyers or other circulars, or in any direct mailing, which expressly or implicitly advocates the success or defeat of a candidate. (Added 1997, No. 64, § 4.)

§ 2882. Identification

All political advertisements shall contain the name and address of the person who paid for the advertisement. The advertisement shall clearly designate the name of the candidate, party or political committee by or on whose behalf the same is published or broadcast. In the case of printed or written matter, the name and address shall be printed or written large enough to be clearly legible, except that this shall not apply to buttons or any written or printed matter attached to or displayed on any motor vehicle. (Added 1997, No. 64, § 4.)

§ 2883. Notice of expenditure

(a) For purposes of this section, "mass media activities" includes television commercials, radio commercials, mass mailings, literature drops and central telephone banks which include the name or likeness of a candidate for office.

(b) In addition to any other reports required to be filed under this chapter, a person who makes expenditures totaling $500.00 or more for mass media activities within 30 days of a primary or general election shall report such expenditures to the secretary of state, and to the candidate whose name or likeness is included in the activity, within 24 hours of making the expenditure. The report shall identify the person who made the expenditure with the name of the candidate involved in the activity and any other information relating to the expenditure that is required to be disclosed under the provisions of subsections (a) and (b) of section 2803 of this title. (Added 1997, No. 64, § 4.)

§§ 2841, 2842. Repealed. 1997, No. 64, § 20, eff. Nov. 4, 1998.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MARCELLA LANDELL, et al., *Plaintiffs*,
NEIL RANDALL, et al., *Plaintiffs*,
and VERMONT REPUBLICAN STATE COMMITTEE,
Plaintiff

v.

WILLIAM H. SORRELL, et al., *Defendants*,
and VERMONT PUBLIC INTEREST RESEARCH GROUP, et al., *Defendant-Intervenors*

Docket No, 2:99-cv-146

ORDER AND OPINION

This is a constitutional challenge to the 1997 Vermont Campaign Finance Reform Act ("Act 64"), codified at Vt. Stat. Ann. tit. 17, Chapter 59 §§ 2801-2883. Plaintiffs seek declaratory and injunctive relief under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the First and Fourteenth Amendments of the United States Constitution. U.S.C.A. Const. Amends. 1 and 14. Plaintiffs argue that certain provisions of Act 64 violate their First Amendment free speech and association rights and do not serve compelling state interests. The challenged provisions of Act 64 are as follows:

Section 2801(2) defines "contribution" as "a payment, distribution, advance, deposit, loan, or gift of money or anything of value, paid or promised to be paid to a

person for the purpose of influencing an election." Vt. Stat. Ann. tit. 17, 2801(1).

Section 2801(5) defines "political party" as "a political party organized under chapter 45[1] of this title or any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party." Vt. Stat. Ann. tit. 17, § 2801(5). The Secretary of State's Office has interpreted Section 2801(5), in conjunction with chapter 45, to mean that town, county, and state committees are a single entity for the purposes of Act 64's campaign contribution limits.[2]

Sections 2805(a) and (b) limit contributions to candidates for Vermont office in a two-year election cycle to $200 for state representative, $300 for state senator, and $400 for governor, lieutenant governor, secretary of state, state treasurer, state auditor, and state attorney general. Contributions from a single source, political party, or political committee to political committees or political parties are limited to $2000. Vt. Stat. Ann. tit. 17, §§ 2805(a) and (b).

Section 2805(c) limits out-of-state contributions to 25% of a candidate's total contributions. Vt. Stat. Ann. tit. 17, § 2805(c).

Section 2805(f) states that the individual contribution limits do not apply to the candidate herself or to her immediate family. Immediate family is defined as

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[1] Chapter 45 (Political Parties), Vt. Stat. Ann. Tit. 17, §§2301 through 2320, sets forth the rules for creating and operating town, county, and state political parties.

[2] Letter of David Grayck, Deputy Secretary of State, May 18, 1999.

"individuals related to the candidate in the first, second or third degree of consanguinity." Vt. Stat. Ann. tit. 17, 2805(f).

Section 2805a(a) limits candidate expenditures in any given two-year election cycle to $300,000 for governor; $100,000 for lieutenant governor; $45,000 for secretary of state, attorney general, treasurer, and auditor; $4,000 for state senator plus $2,500 for each additional seat in the relevant jurisdiction; and $2,000 for state representative in a single-member district and $3,000 for state representative in two-member districts. Vt. Stat. Ann. tit. 17, § 2805a(a).

Sections 2809(a) and (b) provide that related campaign expenditures made on a candidate's behalf shall be considered a contribution to the candidate and, if the related expenditure is over $50, it will also count as an expenditure by that candidate. Vt. Stat. Ann. tit. 17, §§ 2809(a) and (b).

Section 2809(c) states that an expenditure made by a third-party individual is considered a "related expenditure" made on behalf of a candidate or group of candidates if it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates," and is "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c).

Section 2809(d) states that an expenditure made by a political party or by a political committee that primarily benefits six or fewer candidates who are associated with the party or committee triggers a presumption that it is a related expenditure. Vt. Stat. Ann. tit. 17, § 2809(d). The Administrative Rule promulgated by the Secretary of State pursuant to the authority granted in Section 2809(f) states that the presumption is rebuttable by appropriate evidence showing that the expenditure was not intentionally facilitated, solicited, or approved by the candidate. Vermont Secretary of State, Administrative Rule 2000-1(3)(d).

This case results from the consolidation of three separate civil actions: On May 18, 1999, Plaintiffs Marcella Landell, Donald Brunelle, and the Vermont Right to Life Committee, Inc., Political Committee sued Vermont Attorney General William H. Sorrell and Vermont's 14 States Attorneys. Plaintiffs alleged that Act 64 violated their First Amendment freedoms of speech and association (99-CV-146, Paper 1) (hereinafter "*Landell*"). On August 13, 1999, Plaintiffs Neil Randall, George Kuusela, Steve Howard, Jeffrey Nelson, John Patch, and the Vermont Libertarian Party brought essentially the same suit (99-CV-234, Paper 1) (hereinafter "*Randall*."). On October 25, 1999 this case was consolidated with *Landell* (99-CV-234, Paper 13). On February 15, 2000, Plaintiff Vermont Republican State Committee sued on similar grounds, but also raised a challenge to Act 64's application to political parties and committees (00-CV-57, Paper 1) (hereinafter "*VRSC*"). On March 21, 2000 the case was consolidated with *Landell* (Paper 28).

The Vermont Public Interest Research Group, The League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorello, Marion Gray, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, Maria Thompson (collectively "Defendant-Intervenors") successfully moved to intervene in all three of the above cases. Court Orders granting motions: *Landell*, September 27, 1999 (Paper 27); *Randall*, October 25, 1999 (Paper 13); *VRSC*, March 21, 2000 (Paper 28).

For reasons set forth below, this Court finds Act 64 constitutional in part and unconstitutional in part. Specifically, the Court rules as follows:

1) Act 64's contribution limits, Vt. Stat. Ann. tit. 17, §§ 2805(a)-(b), as they pertain to contributions from

individuals, survive the test imposed upon such limits by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), and are therefore constitutional.

2) Act 64's expenditure limits, Vt. Stat. Ann. tit. 17, §2805a(a), although supported by numerous important government interests such as minimizing the reality and appearance of corruption, stemming the manipulative practice of bundling, increasing candidate-voter contact, and inspiring participation in the electoral process, nevertheless are an unprecedented and impermissible extension of *Buckley*. The limits are unconstitutional.

3) Act 64's 25% limit on out-of-state funds, Vt. Stat. Ann. tit. 17, §2805(c), violates candidates' and contributors' First Amendment rights of free speech and association, and is therefore unconstitutional.

4) Act 64's $2000 limit on contributions to political parties, Vt. Stat. Ann. tit. 17, §§ 2805(a)-(b), is constitutional. However, the limit on contributions from political parties to candidates, codified at same, while not per se unconstitutional, is unconstitutionally low. Additionally, Act 64'a definition of state and local parties as one entity pursuant to Vt. Stat. Ann. tit. 17, §§ 2801(5), and 2301 through 2320, and the May 18, 1999 letter from the Deputy Secretary of State, is constitutional.

5) Act 64's $2,000 limit on contributions to political committees, and its various limits on contributions by political committees to candidates, Vt. Stat. Ann. tit. 17, §§ 2805(a)-(b), is constitutional.

6) Act 64's regulation of related expenditures, Vt. Stat. Ann. tit. 17, §2809(a)-(c), is constitutional as it relates to candidate contributions, but unconstitutional as it relates to candidate expenditures. Additionally, Section 2809(d)'s establishment of a rebuttable presumption that an expenditure by a political party or political committee is

related if it benefits six or fewer candidates, as clarified by the Secretary of State, is constitutional.

I. FACTUAL BACKGROUND

It should be noted at the outset of this section that the constitutionality of some provisions of Act 64 depends heavily on facts, while the constitutionality of others does not. The constitutionality of those sections that do hinge on facts depends in large part on whether the legislature was correct in perceiving that there was public concern about corruption in campaign financing, and whether the legislature's responses - i.e., the provisions of the Act - were properly tailored to address that perceived concern. As to the former criterion, the quality and quantity of evidence considered by the legislature, as well as the atmosphere of public concern leading to the Act's creation, are of central importance to this Court's rulings. Therefore, a substantial amount of background concerning the history of campaign finance regulation in Vermont, and the debate at the time of the passage of Act 64, is included in the facts section below.

A. The History of Campaign Finance Regulation in Vermont.

Efforts to regulate campaign finance in Vermont are certainly not new; nor is public concern about the issue. Over the last nine decades the Vermont Legislature has responded numerous times to public concern about the inappropriate influence of money in politics by passing laws limiting contributions and expenditures, as well as compelling

disclosure of campaign finances. Pre-*Buckley* laws to that effect were passed in 1916,[3] 1961,[4] and 1971.[5]

In 1976 the Supreme Court decided its landmark political speech case *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). The Court upheld limits on large contributions as necessary to further the compelling state purpose of preventing actual or perceived quid pro quo corruption in electoral politics, but struck down the spending limits as impermissible direct restraints on protected speech. As a result of *Buckley*, Vermont repealed its spending limits but maintained its contribution limits. 1975 Vt. Laws (Adj. Sess.) 188.

By the time the legislature prepared to revise the law in 1997 the limits on contributions to candidates varied according to the type of contributor. Individuals, corporations, and labor unions were limited to contributing

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[3] After two statewide referenda votes, the Vermont Legislature adopted direct primary elections. The law also included a corrupt practices act that mandated public disclosure after the primary of candidate expenditures, including expenditures on the candidate's behalf. 1915 Vt. Laws 4, § 22; 1916 Vt. Laws (Sp. Sess.) 4, §1

[4] Vermont adopted limits on campaign spending in primaries. 1961 Vt. Laws 178. Primary elections were of the utmost importance in the Republican-controlled state. The law limited spending to $7,500 for every candidate for state office. It prohibited outside contributions toward the cost of media advertising without the candidate's consent, and provided that any such contributions would count toward the candidate's spending limit.

[5] Spending limits were increased and applied to the general election as well. 1971 Vt. Laws 259. These limits were supplemented with contribution limits of $1000 "from a single source, except a contribution from a political party." Contributions from political parties remained unlimited, but there was a $1000 limit on contributions to parties.

$1,000 to a candidate in any election. Political committees were limited to contributing $3,000 to a candidate in any election. Political committees were defined as groups "not including a political party" that received contributions or made expenditures "for the purpose of supporting or opposing one or more candidates or affecting the outcome of an election." Former Vt. Stat. Ann. tit. 17, §2801(4). These same limits applied to contributions to political committees. Political parties were not subject to any limits on making or receiving contributions.

From 1993 to 1998 there existed a rule by which candidates could voluntarily sign an affidavit to limit spending to the amounts that were in place pre-*Buckley*. Former Vt. Stat. Ann. tit. 17, §§ 2841-2842. With each election cycle, however, adherence to the limits plummeted, from 85% to 90% adherence the first year, to under 20% the second year, then quickly to less than 10% adherence. In 1998, no candidates for statewide office signed the affidavit.

B. Publicity Leading Up To the Passage of Act 64.

Throughout the 1990"s there was a well recognized mounting concern about the corrupting effect of money in politics. Public officials recognized the problem and were calling for change. In 1991, Vermont's Secretary of State, Republican James Douglas spoke out in favor of stronger campaign finance regulation, noting that the need to raise large amounts of money for campaigns had heightened public suspicion of quid pro quo deals being struck between big money contributors and candidates. In 1997 Governor Howard Dean said in an address to the Vermont General Assembly, "money does buy access, and we're kidding ourselves and Vermonters if we deny it." Dean's comment, admirably candid, accelerated public discussion of the matter around the state.

Dozens of newspaper articles reflected the high level of citizen concern over the extent of money's influence over politics. While much of the coverage is anecdotal and thus is not persuasive evidence of actual corruption, it does nevertheless demonstrate the attention these issues received in Vermont and conveys the type of pressure that legislators must have felt to react. Such media coverage is therefore pertinent to understanding the decisions of the General Assembly. Papers reported on:

- State politicians' concern with the influence of money on Vermont politics: Senator Jeb Spaulding reportedly stated, "[t]he evidence is all around us that money is a negative influence on the impartial ordering of priorities and passage or failure of bills around here."[6] Senate President Pro Tem Peter Shumlin allegedly opined, "[t]here's no question (money) buys access to the system. In my view, it adversely influences a citizen legislature and elections for that matter."[7]
- The apparent coerciveness of specific contributions: When slate companies contributed to legislators on a study panel considering environmental regulation of the slate industry, one columnist commented, "it's hard to top this for blindness to appearances and propriety."[8] Regarding donations from tobacco companies, one commentator noted that "it's disturbing that Republican lawmakers, armed with

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[6] Christopher Graff, Money Chances Opinions, Burlington Free Press, April 27, 1997, at 6E.

[7] Ross Sneyd, *Politicians Line Up Behind Campaign Finance Reform*, Rutland Herald, Tuesday, April 8, 1997, at _____.

[8] John S. Rosenberg, *Dishonor Roll*, Vermont Magazine, Jan, Feb. 1995, at 21.

$25,450 in donations from tobacco giant Philip Morris, weakened an anti-smoking bill in the final hours of the 1997 session."[9] Reports also described allegations that Governor Dean vetoed a pharmacy bill after collecting $6,000 in campaign contributions from drug companies.[10] State Treasurer Paul W. Ruse was "criticized for financing his campaign with contributions from Wall Street firms with which the state does business."[11] Another article stated that "Ruse even appeared in a magazine advertisement for an investment firm."[12]

- The influence of out-of-state donations: "Outside money is one of Howard Dean's specialties. Of the $312,290 the governor raised for his 1996 election, 65 percent came from out-of-state contributors: labor unions, Washington lawyer-lobbyists, the health care industry, to name a few of the special interests."[13] For the 1994 election 'Dean, for example, received more money from major pharmaceutical manufacturers during the reporting period ($11,000) than he did from people and companies located in Burlington

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[9] Editorial, *Democratic Process Relies On Reform*, Burlington Free Press, October 6, 1997, at 6A.

[10] Bryan Pfeiffer, *Dean Angry About Pharmacy Veto Criticism, News Story*, Rutland Herald, June 16, 1994, at 11.

[11] Chris Graf, *Treasurer Won't Run: Surprise Intended to Thwart Auditor*, Burlington Free Press, July 20, 1994, at 1B.

[12] Editorial, *With Ruse Stepping Out*, Amestoy Must Step In, Burlington Free Press, July 20, 1994, at 6A.

[13] Bryan Pfeiffer, *Some Big Donors To Vt. Democrats Lacked State Ties*, Rutland Herald, May 4, 1997, at 1.

($10,460)."[14] One editorial said, "it's no mystery why out-of-state contributors pumped hundreds of thousands of dollars into Vermont campaigns. . . . They're trying to buy influence. But the cost is public trust."[15]

- The Vermont Attorney General's probe into the state Democratic Party's fundraising practices during the 1996 elections: The investigation centered on "whether some of the . . . campaigns violated Vermont law by failing to report big expenditures" by the state party and "whether those expenditures threw some of the candidates over the limits they had voluntarily agreed to impose on themselves."[16]
- The large amount of special interest money flowing to candidates in the 1996 elections: An editorial observed that PAC money dilutes the influence of Vermont voters: "[n]o doubt the phones are ringing for these PACs and political committees as they buy access. But what about the Fairfield dairy farmer . . . who can't write the big checks?"[17]

C. Legislative Hearings on Act 64.

In drafting Act 64, the various committees that considered the Act conducted more than 65 hearings at which more than 145 witnesses testified. Much of the

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[14] Bryan Pfeiffer, *Governor Doesn't Like the System, But He's Good at It*, Rutland Herald, August 25, 1994, at 1.

[15] Editorial, *No Sale*, Burlington Free Press, November 9, 1996, at 10A.

[16] David Gram, *Democratic Senate Fund Raising Probed*, Burlington Free Press, Tuesday, April 29, 1997, at 1B.

[17] Editorial, *Paying for Power*, Burlington Free Press, October 17, 1996, at 12A.

testimony heard was anecdote and personal opinion. Few witnesses, if any, testified against the bill. Among the evidence considered by the legislature were the following:

- Campaign finance summaries for numerous races including various Senate, House, and statewide races from 1978 through 1996.
- Evidence concerning spending and contribution patterns in Vermont's past elections.
- Testimony and data on the cost of campaigning, including cost of travel, staff, materials, mailings, phone calls, TV and radio ads.
- Testimony on manipulative financing practices such as bundling, through which special interests directed concentrated donations to candidates.
- Testimony concerning the pressures to raise funds: Senator Peter Shumlin testified that the time he spent raising funds prior to the 1996 elections "was one of the most distasteful things that I've had to do in public service."[18]
- Data on former campaign finance laws in Vermont and their efficacy. In particular, the legislature considered the dwindling adherence to voluntary spending limits in the 90's.
- Citizen polls concerning what constitutes an excessively large and/or suspicious donation. According to a 1995 Vermonter Poll, 69% of the respondents agreed that "A $100 limit on private donations will help make government more responsive to the needs of all people."
- Testimony about how particular bills were pushed or killed in committee based in part on the need of some

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[18] Senate Committee on Government Operations Hearing on Campaign Finance, February 4, 1997.

powerful legislators to act in accordance with the wishes of big donors.

- Testimony about the constitutionally valid contribution limits set in Maine.

D. The Process by which Act 64 Became Law.

During the 1997 Legislative Session, three separate bills dealing with campaign finance reform were introduced in the Assembly. Each bill enjoyed widespread bipartisan support.

S.69, "An Act Relating to Public Financing of Campaigns and Limitations on Expenditures," was co-sponsored by 20 senators including the Senate's Republican Assistant Minority Leader, and the President Pro Tem of the Senate. S.I37, 'An Act Relating to the Regulation of Independent Expenditure in Political Campaigns," was also introduced in the Senate by Republicans and Democrats together. Of the 30 members of the Senate, 25 sponsored at least one campaign finance reform bill during the 1997 session. H.28, "An Act Relating to Public Financing of Election Campaign[illegible]" was co-sponsored by Representatives Karen Kitzmiller (D) and Marion Milne (R) in the House. After analysis and consolidation of these three bills, H.28 became the vehicle through which the campaign reform provisions were enacted.

Speaking in support of the passage of H.28, Representative Milne noted that H.28 was supported by Governor Howard Dean (D), Speaker of the House Michael Obuchowski (D), past and present Attorneys General Jeffrey Amestoy (R) (now Chief Justice of the Vermont Supreme Court) and William Sorrell (D), and Secretary of State James Milne (R).

Support was strongly bipartisan for the June 12, 1997 Joint Conference Committee Report on H.28; the House

adopted the Report 121 to 17, with 37 House Republicans voting for it. The Senate adopted the Report by a vote of 20 to 9, with four Republican Senators voting in favor. On June 26, 1997 Governor Howard Dean signed H.28 into law as Act 64.

E. Official Legislative Findings and Intent Supporting Act 64.

After concluding its research and deliberation of campaign finance in Vermont, the General Assembly published extensive findings to support Act 64. The General Assembly found, in relevant part, that:

- Elections were becoming too expensive, and as a result many Vermonters were financially unable to seek election to public office. Furthermore, candidates for statewide office were spending inordinate amounts of time raising campaign funds. Finding (a)(1).
- Some candidates and elected officials respond to contributors who make large contributions in preference to those who make small ones. Finding (a) (2).
- Contributions larger than the amounts specified in this act are considered to be large contributions. Finding (a)(3).
- Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased. Finding (a) (4).
- Limiting large contributions, particularly from out-of-state political committees or corporations, and limiting campaign expenditures will encourage direct and small-group contact between candidates and the electorate and will encourage the personal involvement of a large number of

citizens in campaigns, both of which are crucial to public confidence and the robust debate of issues. Finding (a) (8).

- Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in. the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens. Finding (a)(9).
- Citizen interest, participation and confidence in the electoral process, is lessened by excessively long and expensive campaigns. Finding (a)(10).
- Campaign expenditures by persons who are not candidates have been increasing and public confidence is eroded when substantial amounts of such money are expended, particularly during the final days of a campaign. Finding (a)(13).
- Act 64 was necessary in order to implement Article 8 of Chapter I of the Vermont Constitution which declares "[t]hat all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution." Finding (b).

F. Evidence At Trial

A ten day bench trial took place between May 8, 2000 and June 2, 2000 to gather facts in this matter. The Court has separated findings from that trial into two principal categories below: the state's proffered justifications for enacting the law, and the likely effect the law will have on political campaigns in Vermont.

1. Evidence of Compelling Governmental Interests

Supporting Act 64

Evidence at trial overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics and that voter apathy is on the rise. Furthermore, it appears they have reason to feel that way. The record suggested that large contributors often have an undue influence over the legislative agenda, and that the need to solicit money from large donors at times turns legislators away from their official duties. Evidence supporting these conclusions came from both Plaintiffs and Defendants in the form of public perception, legislator perception, and expert opinion.

a. Erosion of Public Confidence.

Large contributions to candidates have undermined public confidence in Vermont's political system. On behalf of Defendants, Senator Elizabeth Ready (D), as well as Progressive gubernatorial candidate Anthony Pollina, testified at length to their observations of the waning interest of the public in participating in political and electoral matters. They based their opinions both on personal experience with voters and what they perceived to be public response to media coverage of finance controversies such as the tobacco, slate quarry, and pharmaceutical incidents discussed above.

Plaintiffs' witnesses likewise acknowledged the deterioration of public confidence. Gubernatorial candidate William Meub (R) testified that unlimited contributions have given rise to a perception of impropriety, that voters have become cynical, and that in Vermont there was, in his opinion, a general distrust of elected officials. Former Representative Steve Howard (D) testified that in order to restore public confidence in campaign funding, he had

proposed to the Democratic Party that it refuse donations from corporations and lobbyists. Plaintiffs John Patch and Neill Randall also agreed that in the opinion of Vermont voters large contributions raise the appearance of corruption.

The record also demonstrates that the public feels that Vermont's major political parties are heavily influenced, if not controlled, by a few large donors. In the most recent election cycle, political parties in Vermont received substantial amounts of money from sources contributing over $2,000. These contributions came from a small number of donors, yet constituted significant portions of the parties' revenue. In 1998, the Vermont Democratic Party received over $520,000, amounting to 66% of its revenue from just 43 contributors. The Vermont Republican Party received over $300,000, more than 46% of its revenue, from 39 donors.

Statistical evidence supplied by experts buttressed this testimony about deteriorating public confidence. Pollster and analyst Celinda Lake found that 74% of Vermont voters feel that ordinary voters do not have enough influence over politics and government in Vermont; 71% believe that corporations have too much influence; and 70% believe that wealthy individuals have too much influence.

b. Actual and Perceived Influence of Large Contributions on Legislators.

There is reason to believe that large campaign contributions have, at times, had an improper influence on Vermont legislators themselves. Senator Cheryl Rivers testified that in her experience, consideration of large donor concerns frequently shapes the legislative agenda in Montpelier and often determines whether a bill will get enough support from Senate leadership and committee members to move forward. Senator Rivers further testified that the pressure for parties to raise money makes it

increasingly difficult to pursue legislative initiatives contrary to the wishes of interest groups that give large contributions to the state party. As part of a Democratic leadership team, Rivers herself had been asked, contrary to her wishes, to solicit potential donors. She was assigned to call companies such as Electronic Data Systems ("EDS"), a company that is not located in her district and that she would have no reason to contact apart from the need for donations to the party. Senator Rivers insists such practices raise legitimate concerns about undue influence over the legislative agenda.

Expert testimony confirmed that large campaign contributions create the appearance of corruption to the public and affect legislators' voting behavior. Professor Thomas Stratmann testified, based on his own empirical studies, that there is strong evidence that campaign contributions affect legislator behavior. See, e.g., Stratmann, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes.* (Defendants' Exhibit xx-1, location of publication unclear from exhibit). Plaintiffs' expert Dr. John Lott conceded in a letter to Plaintiffs' counsel summarizing his opinion of Act 64 that "[t]he more favors government has to give out, the more resources that people will spend to obtain those favors." Plaintiffs' Exhibit I, at 3.

As a result of the legislature's vulnerability to the demands of large contributors, the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time interacting with voters.

c. Public Suspicion About Out-Of-State Money.

Large contributions from out-of-state donors have raised suspicions of undue influence in the Vermont public. Plaintiff John Patch testified that a large contribution from an

out-of-state corporation could raise suspicions of attempted influence. Similarly, Plaintiff Neil Randall testified that if all of his campaign contributions were to come from out of state it might raise questions about his loyalties. Plaintiff Donald Brunelle stated that he would not want to solicit contributions from outside Vermont. "I would not personally believe that's where I want to get my contributions from. I don't want to be a -- a state Senator for California for example." He stated that if he received out-of-state contributions, he would feel like he represented those contributors, and that he had to serve their interests.

By and large, however, the specific out-of-state contributions which Defendants presented during the trial as troubling to the public, and those which were portrayed as suspicious in the media, were also large contributions, and often came from PACs. No evidence was offered that specifically showed how the "out-of-state" factor was what in fact led to actual or perceived corruption. There was also no evidence at trial to suggest that contributions from out-of-state sources were any more or less corrupting than those from in-state sources. Non-Vermonters such as second homeowners and those interested in regional matters such as the Northeast Dairy Compact may have legitimate interests in Vermont politics and policy.

2. Evidence Concerning the Effect Act 64 Will Have on Campaigns - Narrow Tailoring

a. Contribution Limits.

1. Statistics. Statistics show that Act 64's contribution limits would have very little effect on typical contribution patterns in Vermont. Approximately 88% to 96% of the campaign contributions to recent House races were under $200. Approximately 95% of the campaign

contributions to the 1994 and 1996 Senate races would have been unaffected by the new limits since they did not exceed $300. Even in the more heavily funded 1998 race, more than 82% of contributions would have been unaffected. More than 90% of the campaign contributions to the statewide candidates would have been unaffected by the new limits. Not all statewide candidates received contributions over the $400 limit. *See generally*, Expert Report of Anthony Gierzynski, Defendants' Exhibit U. Gierzynski testified that the shortfall in fundraising reflected in these statistics could be made up for by finding additional sources.

2. Effective campaigning. A great deal of the testimony at trial focused on the question of whether candidates would be able to wage effective campaigns under the new contribution limits. Although Plaintiffs' and Defendants' witnesses at times offered completely different opinions on this point, the more credible evidence shows that such campaigns would indeed be possible.[19] In Vermont, many politicians have run effective and winning campaigns with very little money, and some with no money at all. Plaintiffs' allegations that it would take up to a million dollars to run an effective campaign in this state are wholly unreasonable. Several candidates, campaign managers, and

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[19] Witnesses almost unanimously agreed that the concept of an effective campaign encompasses more than just winning campaigns. Numerous witnesses testified that in a small, community-oriented, principally rural state such as Vermont it would be a mistake to equate effectiveness with the highest spending candidate. Winning was one, but not the only, measure of success described by witnesses. William Meub testified that an effective campaign is a "competitive campaign." Ruth Dwyer's campaign manager Kathleen Summers testified that an effective campaign gets name recognition for the candidate and establishes a connection between the voter and the candidate's beliefs.

past and present government officials testified that they will be able to raise enough money to mount effective campaigns in the system of contribution limits established by Act 64.[20]

3. Example: The March 1999 Burlington Mayoral election. Contribution limits of $200 were in effect for the March 1999 Burlington Mayoral race. The two principal candidates for mayor in 1999 were Peter Clavelle and Kurt Wright. Both were able to amass sufficient resources to run effective campaigns. Clavelle raised almost $39,000, more than he raised in three of his four previous campaigns for mayor. He raised more than $24,000 from 794 contributors of $100 or less. Only 55 contributors gave him the maximum contribution of $200. Wright raised $19,000. Although he received 44 contributions of $200, this was only 13% of all his contributors. He received 290 contributions, amounting to over half of his funds, from contributors of $100 or less. By his own statements, Wright ran an effective campaign in a competitive race against incumbent Clavelle.

4. Curtailment of contributor expression. In the context of Vermont politics, $200, $300, and $400 donations

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[20] Mark Snelling testified that with a $400 contribution limit a candidate for Governor or Lieutenant Governor would be able to raise $300,000 to $400,000, and that candidates for those offices would not have their voices drowned out at those levels; Former Secretary of State Don Hooper testified that candidates for that office could raise sufficient funds for an effective campaign when contributions are capped at $400; Former Lieutenant Governor and Congressman Smith said that a $300 contribution limit for State Senate candidates, and $400 contribution limit for Governor and Lieutenant Governor would still permit candidates to amass sufficient funds to run effective campaigns in Vermont; Ellen David Friedman, co-chair of the Progressive Party, believes that candidates for legislative and statewide offices can amass sufficient resources to run effective campaigns at the contribution levels set by Act 64.

are clearly large, as the legislature determined. Small donations are considered to be strong acts of political support in this state. William Meub testified that a contribution of $1 is meaningful because it represents a commitment by the contributor that is likely to become a vote for the candidate. Gubernatorial candidate Ruth Dwyer values the small contributions of $5 so much that she personally sends thank you notes to those donors.

b. Expenditure Limits.

1. Statistics. The evidence demonstrated that spending limits would have very little effect on House, Senate, and statewide races. Vermont House districts are extremely small. There are about 4,000 people in a single-member district and 8,000 in a two-member district. Only New Hampshire has smaller House districts. Furthermore, the voting-age population of the districts is smaller than the total population, and the number of actual voters is smaller yet. The average number of votes received by winners in single-member districts in the House in 1998 was 1,022; the average number of votes received by winners in two-member House districts was 1,585. The average spending in those districts in the past three election cycles was almost uniformly below the levels chosen for Act 64. The only exception was the single-member district average in 1994, in which the average was $10 over Act 64's $2,000 limit. No serious argument can be made that $10 would make a difference in such a race.

Average spending in Vermont Senate races for the past three election cycles has also generally been below the spending limits established by Act 64. In the two member, three-member and six member Senate districts, candidates underspent the limits applicable to these districts by amounts

ranging from $590 up to $7,120. Only in the single-member senate districts did average spending exceed the new limits.

2. Effective Campaigning. Fact witnesses confirmed that fully effective campaigns for the Vermont Senate can be run under the limits established by Act 64. Peter Brownell testified that he had run an effective campaign for the Senate as a challenger in Chittenden County while spending only $11,000 in 1996. He was re-elected in 1998 while spending only about $9,000. William Meub testified that he spent only $6,000 to $7,000 in his Rutland County Senate race in 1990 (the same district Mr. Howard ran in), and that that was enough to get his message out in that campaign. Under Act 64, nonincumbent candidates in three-seat districts like Rutland County will be able to spend $9,000.

Spending in Vermont statewide elections is very low as well. Vermont ranks 49th out of the 50 states in campaign spending. The majority of major party candidates for statewide office in the last three election cycles spent less than what the spending limits of Act 64 would allow.[21] Over the three election cycles, the average spending by candidates for the lower statewide races (below the level of lieutenant governor) was less than $30,000, with the exception of the losers in 1998.

The Court rejects Darcie Johnston's testimony that it is necessary to spend between $800,000 and $1 million to run an effective campaign for Governor of Vermont. No candidate for Governor of Vermont has ever spent that much money on a campaign. Nor does the Court accept that

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[21] Based on past campaigns, it is fairly clear that Act 64's spending limits would have little, if any, impact on statewide third-party campaigns. None of the third-party candidates for statewide office spent anywhere near the new spending limits in the last three election cycles.

candidates must spend approximately $500,000 in order to run effective campaigns for Lieutenant. Governor and the other lower statewide offices of Secretary of State, Treasurer, Auditor, and Attorney General. No one has ever spent this much for any of these offices, even though there have been competitive races for them.

In Vermont legislative races, low-cost methods such as door-to-door campaigning are standard and even expected by the voters.[22] Other effective low-cost methods of campaigning include participating in debates, using volunteers to distribute literature or staff booths at markets or fairs, attending suppers and barbecues, advertising with placards during rush hour, using public access television ads, and issuing press releases to generate free coverage in the media.

Most Vermont House and Senate candidates generally do not use campaign staff or advertise on television. When television is used - primarily in campaigns for statewide office - it is relatively inexpensive compared to other states.

c. Out-of-state Funds.

1. Statistics. Although some candidates in prior elections have received more than 25% of their campaign contributions from out-of-state donors, most candidates' total income will be unaffected or only slightly affected by the limit on out-of-state contributions. In House races, the average percentage of revenues from out-of-state contributions to House candidates was 2.2% in 1998, 2.6%

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[22] Plaintiff Neil Randall, who defeated a long-term incumbent in 1998, said that door-to-door campaigning was "essential" to his success.

in 19.96, and 1.7% in 1994. In 1994, 96% of the candidates for the House raised less than 25% of their revenues from outside of Vermont. In 1996, 97.9% of the candidates for the House raised less than 25% of their revenues from outside of Vermont. In runs for Senate, the average percentage of revenues from out-of-state contributions to Senate candidates was 9% in 1998, 9% in 1996, and 7.5% in 1994. In 1994, 93.7% of the candidates for the Senate raised less-than 25% of their revenues from outside of Vermont. In 1996, 87.9% of the candidates for the Senate raised less than 25% of their revenues from outside of Vermont. In statewide races, most statewide candidates' out-of-state contributions did not exceed the 25% limit and all but one of the minor party candidates from 1994 to 1998 received no money from out-of-state contributors (one minor party candidate received $28 from a contributor in Nebraska).[23]

2. No proof that 'out-of-state' money corrupts more than in-state. There was no record before the general assembly and no evidence at trial to suggest that contributions from out-of-state sources are any more or less corrupting than those from in-state sources. Nor was there any record or evidence that out-of-state contributions have any greater appearance of impropriety than those from in-state sources.

Non-Vermont contributors may have legitimate interests in Vermont politics and policy. Some examples are second homeowners, those interested in environmental

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[23] It should be noted that these statistics understate to a certain extent the money that comes in from out of state. Consistent with Section 2805(f), money coming from out of state family members to the third degree of consanguinity would not be counted toward the 25%. Vt. Stat. Ann. tit. 17, S. 2805(f).

matters, and those interested in broader regional matters such as the Northeast Dairy Compact.

d. Limits on Contributions to and from Political Parties.

1. Statistics. Thus far, under the limits imposed on contributions to political parties by Act 64, it appears that political parties in Vermont are functioning largely as they have in the past. Vermont Republican Party Chair Pat Garahan acknowledged that as of the date of his testimony (May 2000), the party has already succeeded in raising approximately $400,000 for the year 2000 elections - all in amounts of $2,000 or less. For the entire 1998 election cycle, the party raised only about $283,000 in amounts of $2,000 or less, according to Bensen's report ($693,000 total contributions minus $410,000 raised in amounts over $2,000).

Garahan testified that he cannot be certain how much the party will raise altogether for the 2000 elections, but he expects to raise another $100,000 to $150,000. Thus, even Garahan's prediction is that the party may well raise $550,000 in the very first cycle that Act 64 is in effect compared to $693,000 when donations to the party were subject to no limits whatsoever. Even if it is assumed that Garahan is not being overly cautious in his predictions, this is a substantial portion of the party's past revenues.

2. Role of Parties in Our Political System. There is a clear link between strong political parties and orderly campaigns. In Vermont, however, get-out-the-vote efforts, seed money, candidate recruitment and training, and compilation of voter lists are just a few of the vital services that political parties provide to the electoral competition. In terms of political expression, contributions to and from Vermont political parties mean something quite different from contributions to candidates from individual

Vermonters. Contributing money to candidates is a major means by which political parties define their existence.

3. Distinction Between Parties and PACs. Political Action Committees (PACs), by contrast, function quite differently from political parties in our electoral system. Political parties may have policy platforms, but they are not targeted advocacy organizations. PACs, in contrast, are specifically designed to advocate special interests. Money coming from PACs is therefore much more likely to be designed to gain influence over legislative matters. As a result of this phenomenon, large PAC contributions are more likely to generate suspicions of undue political influence in the minds of the electorate. This makes sense, since candidates who receive money from PACs almost always know where the money comes from and why it was given.

II. DISCUSSION

A. Preliminary Matters: Jurisdiction and Standing.

1. Jurisdiction

This Court has jurisdiction to hear claims arising under 42 U.S.C. § 1983 pursuant to 28 U.S.C. § 1343(a), as well as jurisdiction over constitutional challenges pursuant to 28 U.S.C. §§ 1331 and 1343(a). Abstention is inappropriate for reasons consistent with those discussed in the Second Circuit's recent opinion *Vermont Right to Life Committee, Inc. v. Sorrell*, ____ F.3d ____, 2000 WL 1036310 (2d. Cir., July 28, 2000) ("*VRLC*").

A federal court may only abstain "when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) ("*Pullman*"). "There is little or no discretion to

abstain in a case which does not meet traditional abstention requirements," *Bethpage Lutheran Serv., Inc. v., Weicker*, 965 F.2d 1239, 1244-45 (2d Cir. 1992) (internal quotation marks omitted).

Under *Pullman*, abstention may be appropriate when (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible "to an interpretation by a state court that would avoid or modify the federal constitutional issue." *Greater New York Metro. Food Council v. McGuire*, 6 F.3d 75, 77 (2d Cir.1993) (per curiam). Satisfaction of all three criteria does not automatically require abstention, however. The power is thus discretionary. In deciding how to exercise this discretion, federal courts are instructed to engage in "'a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.'" *Young v. United States Dep't. of Justice*, 882 F.2d 633, 644 (2d Cir.1989) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983)).

In the present action, at least two of the *Pullman* doctrine's three prerequisites to abstention are not satisfied, because the statutory provisions at issue are not unclear and any interpretation given them by the Vermont state courts would not avoid the constitutional questions raised.

Furthermore, in *Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 93-94 (2d Cir. 1998), the Second Circuit held that district courts must exercise particular caution before abstaining where a plaintiff has raised a facial constitutional challenge to a statute and the attendant delay would inhibit exercise of the First Amendment freedoms injured by the statute's existence. "In the context of First Amendment claims, *Pullman* abstention has generally been disfavored where state statutes have been

subjected to facial challenges." *Id.* at 94; *see also City of Houston, Texas. v. Hill*, 482 U.S. 451, 467 (1987).

Because the *Pullman* test is not satisfied, and because delay would clearly Plaintiffs' exercise of their First Amendment rights during the year 2000 Vermont state election campaigns, this Court will not abstain.

2. Standing

Article III, § 2 of the United States Constitution restricts federal courts to deciding "Cases" and "Controversies." Federal courts must determine at the threshold of every case whether 'a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). The threat of suit under the questioned statute may be injury enough. Plaintiffs bringing a pre-enforcement facial challenge against a statute need not demonstrate to a certainty that they will be prosecuted under the statute to show injury, but only that they have "an actual and well-founded fear that the law will be enforced against" them. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988). "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should

not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). "[T]he alleged danger of th[e] statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *American Booksellers*, 484 U.S. at 39.3. *See generally VRLC v. Sorrell*, 2000 WL 1036310.

Under this standard, the record supports Plaintiffs' standing to challenge each of the provisions at issue here. Defendants have meticulously challenged each Plaintiff's standing, and have broken each provision of Act 64 into the smallest possible subdivided pieces. Defendants argue, for instance, that in order for Plaintiffs to challenge Section 2805(a), which sets limits for, contributions to campaigns. for state representative, state senator, governor, lieutenant governor, secretary of state, state treasurer, state auditor,. and state attorney general, as well as for contributions to political parties and political committees, Plaintiffs must have within their ranks someone who is involved in each and every one of those elections and organizations. This extreme view of standing doctrine is excessively meticulous. It is, rather, sufficient that each Plaintiff legitimately possesses "an actual and well-founded fear that [Act 64] will be enforced against" them, *American Booksellers*, 484 U.S. at 393, and that at least one Plaintiff has legitimate standing to challenge each of the provisions at issue:

Plaintiffs Donald Brunelle, Neil Randall, George Kuusela, and John Patch, as candidates for either the Vermont House or Senate who plan to collect contributions and make expenditures in their runs for office, have standing to challenge Sections 2801(2) and (5), 2805(a), (c) and (f), 2805a(a), and 2809(a)-,(d). Plaintiff Marcella Landell, a registered Vermont voter who receives campaign literature from political organizations and candidates she wishes to

support, stands to have her First Amendment right of association curtailed by Act 64's spending limits and therefore has standing to challenge Section 2805a(a) and 2809(a)--(d). Plaintiff Jeffrey Nelson has in past election cycles made political contributions in excess of the limits established in Act 64 and therefore has standing to challenge Section 2805(b). Plaintiff Steve. Howard, who formerly held elected office in Vermont and intends to run again in the future, testified that he refrained from running for office this year because he felt Act 64 would have seriously impeded his ability to raise sufficient funds for his election campaign. He therefore has standing to challenge Sections 2801(2), 2805(a), (c) and (f), 2805a(a), and 2809(a)-(d). Plaintiff Vermont Right to Life Political Action Committee, as a registered, internal, state political action committee which intends to raise and contribute money to certain Vermont political candidates in the upcoming election, has standing to challenge Sections 2805(a) and (c), as well as 2809(a)-(d).

Plaintiffs Vermont Libertarian. Party and Vermont Republican State Committee are registered political parties in Vermont. As such, they financially support selected candidates for office by raising and contributing money to those candidates. Because they intend to carry out their supporting role for Vermont political candidates this year and in the future, they have standing to challenge all sections pertaining to the definition of, and limits on, political parties, including Sections 2301 through 2320, 2801(5), 2805(a) and (c), and. 2809(d).

Plaintiffs therefore have standing to bring this action.

B. Constitutionality of the Challenged Provisions

In evaluating constitutionality of Act 64, this Court has adopted the selection of official findings excerpted above in the facts section of this opinion. Although legislative

findings are not entirely isolated from review, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 199 (1997), this Court is required to exercise considerable deference to such findings. *Id.* Having reviewed the evidence and testimony presented to the legislature in the hearings on Act 64, this Court adopts the excerpted findings.

The Court may also, however, consider evidence presented at trial that was not available to the legislature. Consideration of such additional evidence is both proper and common. *See Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897 (2000) ("*Shrink*") (evidence relied upon by the Supreme Court in upholding Missouri's limits came almost entirely from evidence presented by the parties during litigation because Missouri does not preserve legislative history); *see also Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 456 (1st Cir. 2000) ("*Daggett II*") (relying on evidence presented during litigation to determine constitutionality of contribution limits).

1. Act 64's Contribution Limits, Vt. Stat. Ann. tit. 17, § 2805(a) and (b), As They Pertain to Individuals, Are Constitutional

Sections 2805(a) and (b) limit contributions to candidates for Vermont office in a two-year election cycle to $200 for state representative, $300 for state senator, and $400 for governor, lieutenant governor, secretary of state, state treasurer, state auditor, and state attorney general. The legislature enacted this provision because it found that large contributions reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interest of Vermont citizens. Finding (a) (9). Plaintiffs insist that the statute constitutes an impermissible limit on their free speech and

association rights, that it is not supported by a sufficient governmental interest, and that it is not narrowly tailored. As to the latter claim, Plaintiffs argued in pre-trial pleadings that the provision improperly lumps together fundraising for primary and general elections, that the provision will have a disparately negative impact on the ability of certain candidate subgroups to attain office, and that the family exception is overbroad.

The legal standard for evaluating the constitutionality of campaign contribution limits was established by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). There, the United States Supreme Court considered constitutional challenges to certain provisions of the Federal Election Campaign Act ("FECA"). Among other things, FECA limited federal campaign contributions and expenditures. Such limitations, the Court warned,

> operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the' unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Buckley, 424 U.S. at 14-15 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)). Any limits on such political expression are subject to "exacting scrutiny," *id.* at 16, and can survive constitutional attack only if justified by a compelling state interest. *Id.* at 44-45.

Having established that exacting scrutiny applied generally to the area of campaign finance regulation, however, the Buckley Court then distinguished between the

different degrees of constitutional threat posed by contribution and expenditure limits. On the one hand, contribution limits could be found constitutional if they served the compelling state interest of deterring actual or perceived quid pro quo corruption. *Id.* at 25-26. On the other hand, the Court found that expenditure limits could not be similarly justified because money being spent by a candidate on him or herself could not give rise to any such quid pro quo arrangement. *Id.* at 55. *See also Kruse v. City of Cincinnati*, 142 F.3d 907, 915 (6th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998) ("A fortiori, the spending of money legally raised by candidates themselves poses no risk of quid pro quo corruption..."). In light of this distinction, the Court established a less stringent standard to be applied to contribution limits.

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.

Buckley, 424 U.S. at 20. Pursuant to this less stringent standard, the Court upheld FECA's $1,000 limit on contributions by individuals or groups to candidates for federal office. The Court agreed that Congress had reason to believe that contributions over $1000 gave rise to perceptions of corruption, and that this belief was a sufficient to justify such limits. *Id.* at 26-27.

While accepting the anti-corruption rationale, however, the Court specifically rejected two other proposed government interests; namely, the spiraling cost of political campaigns, and the government's desire to level the playing field between candidates with disparate access to campaign funds. *Id.* at 25-26.

Buckley did not establish absolute dollar thresholds. "[I]f it is satisfied that some limit on contributions is

necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (quotation omitted); see also *Daggett v. Webster*, 81 F.Supp.2d 128, 139 (D. Maine 2000) ("*Daggett I*") ("If contribution limits are permissible, differences in their level 45 from state to state should reflect democratic choices, not court decisions.").

The *Buckley* Court also never explicitly stated that anti-corruption was the only acceptable compelling government interest; it only stated that spiraling costs and leveling the playing field were not acceptable. 424 U.S. at 25-26. *Buckley* therefore has not foreclosed recognition of additional compelling governmental interests.

In *Shrink*, 120 S.Ct. 897 (2000), the Court revisited the issue of contribution limits for the first time since *Buckley*. In upholding a Missouri statute that imposed a $1000 limit on individual contributions, the Supreme Court affirmed its fundamental holdings in *Buckley*: infringements upon campaign finance invoke the First Amendment and are therefore subject to "exacting" scrutiny, and the only recognized justification for them is actual or perceived corruption. 120 S.Ct. at 906-907. The *Shrink* Court further clarified that a contribution limit involving "significant interference" with associational rights can only survive if the Government demonstrates that the contribution regulation "[i]s closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tun[ed]." *Id.* at 904 (citations omitted). The Court repeated that its authorization of $1000 limit in Buckley wasn't based on a specific dollar amount. "[T]he dictates of the First Amendment are not mere functions of the Consumer Price index." *Id.* at 909 (quoting *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 525 (8th Cir. 1998) (dissenting opinion). Rather, the figure was adjustable and was to be

controlled by the principle that contribution limits could not be set so low as to create ineffective campaigns. *Id.*

Proof of actual or perceived corruption does not need to be exacting. "Buckley was practical on the subject of proof; it recognized that corruption could 'never be reliably ascertained.'" *Daggett I.* 81 F.Supp.2d at 134 (2000) (quoting *Buckley*, 424 U.S. at 27. All that is required is that the threat not be illusory. *Id.*

The threat of corruption in Vermont is far from illusory. Evidence provided by citizen polls and comments by public officials demonstrate that the threat is quite real. Furthermore, it is beyond argument that the public perceives corruption in the political electoral system. Typical barometers of citizen concern such as polls and media coverage point to the fact that Vermonters are troubled by how money influences campaigns. Such barometers have been used by many other courts in evaluating the governmental interest that underpins contribution limits. *See Daggett v Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 at 457 (2000) ("*Daggett II*"); *Shrink Missouri Government PAC v. Adams*, 204 F.3d 838, 841-842 (8th Cir. 2000). *See also Florida Right to Life v. Mortham*, slip op at 10, No. 98-770-Civ-Orl-19A (M.D. Fla. March 20, 2000). The Court therefore concludes that Defendants have demonstrated that the state had a sufficient governmental interest to support its adoption of contribution limits.

Having established that a compelling governmental interest justified Act 64's contribution limits, this Court must now consider whether those limits are narrowly tailored to serve that interest. In determining whether contribution limits are narrowly tailored, courts have considered factors such as cost-per-voter statistics, the level of limits that have survived constitutional challenge elsewhere, the experiences of persons running for office, costs of campaigning, types of campaigning, history of reform, and media reflection of

general public sentiment. *See, e.g., Daggett II*, 205 F.3d at 457; *Shrink Missouri Government PAC v. Adams*, 204 F.3d 838, 841-842 (8th Cir. 2000); *Florida Right to Life v. Mortham*, slip op. at 10, 98-770-Civ-Orl-19A. The Vermont legislature considered each of these factors as well.

Statistics proffered at trial show that the vast majority of contributors in the past three election cycles have made contributions at or below the maximum levels set by Act 64. Expert testimony revealed that over the last three election cycles the percentage of all candidates' contributions received over the contribution limits was less than 10%. (In two of the three previous election years, only 5% to 6% of contributors to Senate campaigns would have been affected, and only 4% to 5% of contributors to House campaigns would have been affected.)

Furthermore, Vermont's limits are squarely within the bounds of constitutionality when compared to contribution limits upheld in Maine and Missouri. In *Daggett II*, the First Circuit examined a Maine law that limited contributions to $250 for House and Senate candidates. The Court initially compared the limit with the $1,075 limit per 250,000 constituent limit upheld in *Shrink*. Given that Maine House Districts averaged 8,000 constituents and Senate Districts averaged 34,000, the Court found the $250 limit permissible in light of the *Shrink* limit. *Daggett II*, 205 F.3d at 459. It then examined the historical spending and contribution patterns of Maine elections. In light of the non-expensive nature of the typical Maine campaign and the limited impact of the limits on the historical levels of giving, the Court found the limits constitutional. Id. at 458-462. Proportionally speaking, Vermont's limits are perhaps even more generous than those of Maine, for while they are roughly comparable in dollar amount, the relevant districts in Vermont contain substantially fewer voters. Following remand from the Supreme Court, in *Shrink Missouri*

Government PAC v. Adams, 204 F.3d 838 (8th Cir. 2000), the Eighth Circuit upheld Missouri's per election contribution limits of $525 for State Senate or any office where the population of the electoral district is 100,000 or more and $275 for House or any office where the population of the electoral district is under 100,000. *Id.* at 842-43. Vermont's ratio of the contribution limit to the size of the constituency is .00068 for statewide elections, whereas the same ratio for Missouri is .00040. Vermont's statute allows over 50% more money to be contributed per constituent than does Missouri.[24]

The possibility of effective campaigning is an integral component of the narrow tailoring standard. *Shrink*, 120 S.Ct. at 900. In the present case, the Court heard ample evidence on this point, the most significant of which concerned the 1999 Burlington Mayoral election. Burlington, located in Chittenden County, is the largest city in Vermont. In terms of voting population and the cost of running an effective campaign, the Burlington Mayoral election provides a reasonable comparison to a countywide senate race. The revenues raised in that race suggest that the $300 contribution limit for State Senate races will not adversely affect senatorial candidates. The candidates for mayor of Burlington were limited to $200 contributions, yet they raised $19,000 to $39,000. The candidates for State Senate

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[24] See also *Florida Right to Life v. Northam*, slip op., No. 98-770-Civ-Orl-19A, where the District Court upheld Florida's $500 limit on contributions to candidates. While House Districts in Florida contain 90,000 residents, the largest House Districts in Vermont are barely one-tenth the size, with 4,0.00 constituents in a one-member district, and 8,000 in a two-member district. While Senate campaigns in Florida typically cost $250,000, the average Senate campaign in Vermont over the past three election cycles has been in the $7,000 to $12,000 range.

from Chittenden County will be limited to $300 contributions. In the past Chittenden County Senate candidates have spent on average $10,000, with ranges up to $30,000. Given the higher contribution limit for the Senate races, they should be able to raise at least as much as was raised in Burlington.

Witnesses did acknowledge that they may need to employ new fundraising techniques to raise this money. They may need to broaden their base of support as they seek more small contributors, rather than rely on a few large contributors. This will take more time and energy. Yet credible testimony from citizens, politicians and experts suggested that compelling candidates to increase constituent contact would improve the health of the democratic system.

The limits set by the legislature do accurately reflect the level of contribution considered suspiciously large by the Vermont public. Testimony suggested that amounts greater than the contribution limits are considered large by the Vermont public. (Young, Rivers, Pollina, Smith.) Plaintiffs testified to this as well. (Patch, Kuusela, Landell.)

Contrary to Plaintiffs' claims, Act 64's contribution limits may in point of fact actually improve candidate-voter communication by lessening the need for candidates to concentrate on wooing big donors. By diminishing the need for targeted pandering, these limits arguably enhance, rather than limit, a candidate's freedom to communicate. Statistics do reveal that some candidates may be hit harder by these limits than others. However, the overall effect on fund raising will be rather small.

Finally, the Court wishes to respond briefly to three other matters pertaining to narrow tailoring. Although these matters do not affect the Courts finding that the statute is narrowly tailored, they nevertheless came up frequently in court and each merits brief comment.

First, the legislature rejected the idea of having two different regulatory regimes for primary and general elections in favor of applying one overall limit. This was so that candidates would have greater freedom to decide how to allocate their funds between the primary and general elections. In itself, the legislature's reasoning is not evidence of insufficient tailoring. Vermont's primary is closer to the general election than is -true in most states. This year's primary election, for example, will be in mid-September, just two months before the general election. In Maine, the primary is in June. Me. Rev. Stat. Ann. 21-A § 339 (West 19___); In Missouri, the primary is in August. Mo. Rev. Stat. § 115-121 (19___). Application of the limits to the two-year election cycle is entirely reasonable given this proximity.

Second, with regard to particularly affected groups, the Court's role "is not to probe the intricacies of the limit. Even if we were to consider the effects on individual groups, we would not find enough to deem the limits facially unconstitutional." *Daggett II*, 205 F.3d at 461 (citations omitted). Plaintiffs did not prove that specific types of candidates, be they challengers or incumbents, republicans or democrats, non-wealthy, women, non-traditional, or third-party candidates, would be disproportionately affected by the contribution limits. Across the board, Plaintiffs' arguments on this point were speculative.

Finally, a few words of clarification on the exception made to these limits for family members within three degrees of consanguinity are necessary. Section 2805(f) defines "immediate family" as "individuals related to the candidate in. the first, second or third degree of consanguinity." Consanguinity is defined as "the relationship of persons of the same blood or origin." Black's Law Dictionary 299 (7th

ed. 1999); *see also MacCallum v. Seymour's Administrator*, 686 A.2d 935,937 (Vt. 1996) (noting that consanguinity means "bloodline") [25]

Act 64 does not provide what system should be used for determining relationships and degrees of kindred. In other contexts, however, Vermont relies on the civil law rules in making this determination. *See, e.g.*, Vt. Stat. Ann. tit. 14, § 552 (under Vermont's descent laws, the degrees of kindred are computed according to the rules of the civil law); *State v. Wyman*, 8 A. 900, 901 (Vt. 1887) (noting that a Vermont criminal statute in effect in 1887 provided that "degrees of kindred shall computed according to the rules of the civil law"). In order to determine degrees of kindred under the civil law rules, one "begins with the intestate, and ascend[s] from him to common ancestor, and descend[s] from that ancestor to claimant, reckoning a degree each generation." 26a *C.J.S. Descent & Distribution*, Section 22.

Applying the civil law rules to Act 64, contributions from the candidate's great-grandparents, grandparents, parents, children, grandchildren, great-grandchildren, aunts, uncles, siblings, nieces, and nephews are not limited by Act 64's contribution limitations. Contributions from the candidate's great aunts and uncles and first cousins, however, are capped by Act 64's contribution limitations.

The Court does not accept Plaintiffs' contention that the validity of Act 64's contribution limits is undermined by this exception. Act 64's contribution limits are designed to

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[25] Consanguinity is distinguished from affinity, which is the "relation that one spouse has to the blood relatives of the other spouse." Black's Law Dictionary 59 (7th ed. 1999). Contributions from the candidate's spouse and the spouse's blood relatives are limited by Act 64's contribution limitations because these contributions are from individuals related to the candidate by affinity and not by consanguinity.

target corruption. The Vermont legislature properly reasoned that a contribution from one's grandmother is not as likely to have a corrupting effect as a contribution from a tobacco company or labor union.

For all of the reasons set forth above, Act 64's contribution limits are constitutional.

2. Act 64's Expenditure Limits, Vt. Stat. Ann. tit. 17, § 2805a(a), Are Unconstitutional

Section 2805a(a) limits candidate expenditures in any given two-year election cycle to $300,000 for governor; $100,000 for lieutenant governor; $45,000 for secretary of state, attorney general, treasurer, and auditor; $4,000 for state senator plus $2,500 for each additional seat in the relevant jurisdiction and $2,000 for state representative in a single-member district, and $3,000 for state representative in two-member districts. Vt. Stat. Ann. tit. 17, § 2805a(a). In support of Act 64's expenditure limits, the Vermont legislature found, *inter alia*, that election campaigns for statewide and state legislative offices were becoming too expensive, and that as a result "many Vermonters are financially unable to seek election to public office and candidates for statewide offices are spending inordinate amounts of time raising money." Finding (a)(1). The legislature also found that "[r]obust debate of issuers, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased." Finding (a)(4). Plaintiffs insist that this is a flatly unconstitutional ban on a candidate's free speech rights.

Buckley set an extremely high constitutional threshold for expenditure limits when it held that FECA's "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and

association than do its limitations on financial contributions." *Buckley*, 424 U.S. at 24. The Court explicitly distinguished the indirect restraint on political discourse posed by contribution limits from the direct restraint posed by expenditure limits. Because "[T]he independent advocacy restricted by [FECA's spending limit] does not appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions, *id.* at 46, the Court concluded that FECA's spending limits could not be justified by deterrence of quid pro quo corruption. Quid pro quo arrangements, the Court explained, simply could not arise out of candidates spending money on dissemination of their own messages. *Id.*

Since *Buckley*, only one circuit court has considered the constitutionality of spending limits. In *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998), the Sixth Circuit struck down spending limits enacted by the City of Cincinnati for its city council elections. The court adhered narrowly to *Buckley*, reasoning that because *Buckley* held that spending limits are not justified by deterrence of quid pro quo corruption, nor by stemming the high cost of campaigns, nor by striving for a level playing field with respect to campaign funds, and because the city of Cincinnati offered only those interests, the spending limits were impermissible. 142 F.3d at 909.

There is, however -- both in Kruse and among the Justices of the Supreme Court - substantial disagreement over whether *Buckley* leaves open the possibility that other governmental interests might support spending limits. In *Kruse*, one member of the panel, while concurring in the ruling striking down Cincinnati's limits, disagreed with the majority's interpretation of *Buckley*, concluding that *Buckley* does not render spending limits unconstitutional as a matter of law.

> The Supreme Court's decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be... that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.

Id. at 920 (concurring opinion of Cohn, D.J., sitting by designation).

In *Shrink*, four Justices opined that neither *Buckley* nor the First Amendment should be read as an inflexible bar to spending limits Justice Breyer called for a constitutional analysis of campaign finance limits that balances competing constitutional interests. *Shrink*, 120 S.Ct. at 913 (concurring opinion of Breyer, J., joined by Ginsburg, J.). He stated that "it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience . . . making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns." *Id.*

Justice Kennedy stated, "[f]or now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising." *Id.* at 916 (Kennedy, J., dissenting).

Justice Stevens' explained that he believes that money is property, not speech, *id.*, at 910, and as such, it is entitled to the constitutional protections normally afforded to property rather than speech. "These property rights,

however, are not entitled to the same protection as the right to say what one pleases." *Id.* (Stevens, J., concurring).

Justices Stevens and Ginsburg voiced similar concerns with *Buckley* in *Colorado Republican Federal Campaign Committee*, 518 U.S. 604 (1996) ("*Colorado Republican*"):

> I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. As Justice White pointed out in his opinion in Buckley, "money is not always equivalent to or used for speech, even in the context of political campaigns." [Justice White dissented in Buckley on the campaign spending limits question.] It is quite wrong to assume that the net effect of limits on contributions and expenditures - which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials - will be adverse to the interest in informed debate protected by the First Amendment.

Id. at 649-50 (Stevens, J., joined by Ginsburg, J., dissenting) (citations omitted).

Powerful, if not controlling, judicial commentary such as this reinforces the view that the constitutionality of expenditure limits bears review and reconsideration. Spending limits are an effective response to certain compelling governmental interests not addressed in *Buckley*: (1) "Freeing office holders so they can perform their duties," in the words of Judge Cohn, *Kruse*, 142 F.3d at 920, or, as Justice Kennedy put it, "permitting officeholders to

concentrate their time and efforts on official duties rather than on fundraising," *Shrink*, 120 S.Ct. at 916; (2) "[P]reserving faith in our democracy," *Kruse*, 142 F.3d at 920; (3) "[P]rotecting access to the political arena" as stated by Stevens, *Colorado Republican*, 518 U.S. at 649-650; and (4) "diminish[ing] the importance of repetitive 30-second commercials." *Id.*

This Court would be remiss not to acknowledge that the state proved that each of these concerns exist, and that Vermont's expenditure limits address them. The state's factual presentation at trial decidedly sets this case apart from both *Buckley* and *Kruse*. Judge Cohn remarked in *Kruse*, "[i]t should be recognized that [*Buckley*] was decided on a slender factual record. Similarly, although the City here attempted to develop a compelling factual record, it failed to do so." 142 F.3d, at 919.

The same simply cannot be said of this case. Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this Court understands why it included spending limits as part of its comprehensive campaign finance bill.

Nevertheless, this Court is bound by the doctrine of *stare decisis* to adhere to Supreme Court precedent. In view of the absence of case law on this matter in this circuit, and the Supreme Court's directives in Buckley, this Court cannot take the unprecedented step of finding expenditure limits constitutional. *Kruse* is the only case on this matter other than *Buckley* itself. Its interpretation of *Buckley* must therefore be given proper consideration as well.

It is not insignificant that as soon as *Buckley* came out the Vermont legislature amended its campaign finance regulations by eliminating mandatory spending limits. *See supra*, at 8-9. At the very least this should be considered some indication of what the Vermont legislature thought of the dubious constitutionality of such limits at that time.

Furthermore, spending limits do not exist anywhere in the country other than in the city of Albuquerque, New Mexico, and no one has challenged those limits yet.

Accordingly, Act 64's spending limits are unconstitutional.

3. Act 64's 25% Limit On Out-Of-State Funds, Vt. Stat. Ann. tit. 17, § 2805(c), Is Unconstitutional.

Section 2805(c) limits out-of-state contributions to 25% of a candidates total contributions. Vt. Stat. Ann. tit. 17, S 2805(c). In support of these limits, the Vermont legislature found that "large contributions . . . particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens." Finding (a)(9). Plaintiffs argue that this impermissibly infringes on protected speech.

The only two reported decisions on the subject of out-of-state contributions were decided by the Ninth Circuit Court of Appeals. *Vannatta v. Keislinq*, 151 F.3d 1215 (9th Cir. 1996); *Whitmore v. Federal Election.Comm'n*, 68 F.3d 1212 (9th Cir. 1995). Both decisions held that such contributions could not be restricted. In *Vannatta* the Ninth Circuit affirmed an injunction against a statute similar to the one challenged in this case. That statute limited to 10% the amount of money that could be contributed by out-of-district donors. 151 F.3d at 1218. Applying the rigorous scrutiny standard established by the Supreme Court for infringements on First Amendment rights, the panel unanimously agreed that the measure could not be supported by the state's interest in preventing corruption since out-of-state contributors are no more linked to corruption than in-state contributors. *Id.* The Court also rejected a second interest purportedly advanced by the measure, protecting the

integrity of a republican form of government by assuring that representatives are elected by their own constituents. *Id.*

Defendants contend that limits on out-of-state contributions combat the perception that the Vermont legislature might be unduly influenced by out-of-staters. Defendants' argument on this point is not well focused. Firstly, most if not all of the examples of allegedly suspicious out of state contributions enumerated by Defendants -- and especially those targeted by the press -- also happened to be large and often from special interest groups that are viewed by. the public stereotypically as the source of suspicious campaign money. There was no evidence that the fact that the money came from out of state is necessarily the root of the problem. Secondly, the proffered justification does not account for the fact that many people outside of Vermont have legitimate stakes in Vermont politics, and therefore have a right to participate in Vermont elections. Individuals from outside Vermont who are nevertheless influenced by Vermont law must have some access to the political process here.

In addition to the fact that the out-of-state contribution limit lacks the support of a legitimate governmental concern, the provision is also unconstitutional because it is not narrowly tailored. The mechanics of the provision are flawed in that it functions as a complete ban on the ability of some Vermont state level candidates to receive contributions from certain out-of-state would-be contributors.

Because no recognizable state interest exists to justify the out-of--state limits, and because the provision is not narrowly tailored, it violates the First Amendment freedoms of speech and association.

4. Act 64's Limit on Contributions to Political Parties, Vt. Stat. Ann. tit. 17, §§ 2805(a) and (b), is

Constitutional, But The Limit on Contributions from Political Parties to Candidates Is Not.

a. Act 64's Limits on Contributions to Political Parties Are Constitutional

Section 2805(a) limits contributions to political parties to $2000. The legislature enacted this provision in order to prevent evasion of the individual contribution limits. Two separate questions of law govern the constitutionality of this provision: is it constitutional to regulate such contributions at all, and if so, to what extent?

Buckley upheld FECA's $25,000 aggregate annual limit on contributions by an individual, computed by combining an individual's contributions to all federal candidates, national political parties, and political committees in a given year. 424 U.S. at 25-26. The Court explained that the aggregate limit on contributions to all those entities was justified because it "serves to prevent evasion of the $1,000 contribution limitation [on donations to candidates] by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of... huge contributions to the candidate's political party." Id. Given that Buckley's aggregate contribution limits encompassed contributions to political parties, Act 64's specific limits, on contributions to political parties deserve no different treatment - both are specifically and legitimately designed to prevent circumvention of individual contribution limits.

Three of the four opinions in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), indicate that a majority of Justices continue to endorse limits on contributions to political parties. The plurality opinion, while invalidating limits on independent expenditures by

political parties, indicated that direct donations to political parties could be limited:

> The greatest danger of corruption . . appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate. We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties.

Id. at 617 (plurality opinion of Breyer, O'Connor and Souter).

The two dissenting Justices in *Colorado Republican*, Justices Stevens and Ginsburg, would have sustained the limits on independent expenditures by parties that were directly at issue in the case and, therefore, would sustain limits on direct contributions to and by parties. *Id.* at 649. Justice Kennedy's opinion, joined by Chief Justice Rehnquist and Justice Scalia, carefully distinguished between limits on coordinated expenditures, viewed as protected expression by the party itself, and "undifferentiated political party contributions." *Id.* at 628-629. Justice Kennedy stated that Congress may have the authority to regulate the latter, but noted that such a regulation was not at issue in the case. *Id.* at 630.

Lower courts have upheld state limits on contributions to political parties as well. In *Citizens for Responsible Government State PAC v. Buckley*, 60 F.Supp.2d 1066, 1094-1096 (D.Colo. 1999), the court upheld an annual limit of $2,500 on individual contributions to political parties in Colorado. "In order to prevent circumvention of individual contribution limits, Congress

can directly limit contributions to political parties..." *Id.* at 1095. *See also State v. Alaska Civil Liberties Union*, 978 P.2d 597, 625 (Alaska 1999) ("*AkCLU*") (upholding limit of $5,000 on contributions to political parties in Alaska).

Anti-evasion is thus a well recognized and accepted justification for establishing limits on giving to parties within campaign finance regulatory schemes. *Citizens for Responsible Government State PAC v. Buckley*, 60 F.Supp.2d at 1095. As the legislative findings state, Act 64's limit on giving to political parties was designed specifically to prevent evasion of the $200, $300, and $400 limits on contributions to candidates from individuals. Absent the provision, this loophole would permit large sums of money from a particular interest to reach candidates by passing through a political party. Although Vt. Stat. Ann. tit. 17, § 2805(e) prohibits the purposeful transfer of funds to a person for the purpose of further transferring it to a candidate, that provision is likely to catch only the most blatant behavior.[26]

The Court turns now to the question of narrow tailoring. Act 64's $2,000 limit on contributions to parties passes the narrow tailoring test so long as its dollar amounts are not "so radical in effect as to render political association ineffective, drive the sound of [a political party's] voice below the level of notice, and render contributions pointless. Shrink, 120 S.Ct. at 909.

The limits established by Act 64 hardly drive the voice of contributors to political parties so low as not to be

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[26] It was hardly speculative on the part of the legislature to think that such end runs would have been attempted. Indeed, Plaintiff Jeffrey Nelson testified that because of the limit on contributions to candidates he has already shifted his donations to the Republican Party and the Republican Legislative Election Committee PAC. It is reasonable to assume that larger special interest donors would do the same.

heard. Donors may give $2,000 to a Vermont political party even if they have already made direct contributions to any number of individual candidates of the same party for Vermont office. Evidence clearly established that $2,000 contribution is a very large contribution in the context of Vermont politics. In comparison to the contribution limits. set for individual candidates, and in light of the testimony about what constitutes a large contribution in the eyes of the Vermont public, these limits in fact allow for very loud voices. Within the legislature's scheme for regulating campaign money, Act 64 actually promotes party activity above that of individual donors by allowing much higher donations to parties than to candidates.

Evidence of recent fundraising also suggests that the limits are at an appropriate level. Under the limits established by Act 64, the Republican Party had already raised $400,000 for the 2000 elections at the time of trial and expected to raise another $100,000 - $150,000, for a total of $500,000 - $550,000. By comparison, in 1998 when the Party raised more than in any other past election cycle, it raised a total of $693,000. Based on the Vermont Republican State Committee's experience so far, it appears its revenue will not decline as much as party revenues did in Alaska when similar limits were imposed. In *AkCLU*, 978 P.2d at 623, the limits on contributions to parties were upheld despite evidence showing that state Republican party revenues had declined from $362,525 in 1995 to $119,917 in 1997.

Given that Act 64's limit on contributions to parties serves the legitimate governmental interest of preventing evasion of individual constitutional limits, and given that the limit level will not unduly hush the voice of political parties in Vermont, the limit is constitutional.

b. Although Limits on Contributions from Parties to

Candidates Are Constitutional Generally, Act 64's Limits Are Unconstitutionally Low.

Because political parties play a unique role in the mechanics of our democracy, limits on contributions by them to candidates deserve especially careful attention. As the Tenth Circuit put it earlier this year:

> Political parties have played a vital role in the American system of government.
>
> [A]stute observers[] all agree that the political party is---or should be--central to the American political system.. Parties are--or should be-integral parts of all political life, from structuring the reasoning and choice of the electorate, through all facets of campaigns and seemingly all facets of the government, to the very possibility of effective governance in a democracy.
>
> John H. Aldrich, Why Parties: The Origin and Transformation of Political Parties in America 18 (1995). . . . In its FECA enactments, Congress certainly recognized the importance of parties.
>
> The Supreme Court likewise has acknowledged the role of the party. Indeed, all three branches of government, to an important extent, rely on the speech and associational functions of parties to assure the orderly conduct of elections, appointments and governance in general.

Federal Election Commission v. Colorado Republican Federal Campaign Committee, 213 F.3d 1221, 1228 (10th Cir. 2000) (citations and quotations omitted). Proper consideration of this role, however, must be balanced. against the threat of corruption that often filters through the

party machines: "There is genuine potential for corrupting undue influence on a candidate's campaign if political parties are not restricted in their ability to contribute to individual candidates." *Citizens for Responsible Government*, 60 F. Supp. 2d at 1094; "Absent any limits on contributions by parties, we believe there would be substantial potential for undue influence, i.e., *quid pro quo* corruption or the appearance of corruption. The natural tendency of successful candidates who receive unlimited contributions from a party would be to reduce independent consideration of issues and adhere to positions taken by the party itself." *AkCLU*, 978 P.2d at 626.

In an opinion rendered earlier this year, *Missouri Republican Party v. Lamb*, 100 F.Supp.2d 990 (E D, Mo. June 22, 2000), the District Court for the Eastern District of Missouri confirmed that such limits are constitutional under *Shrink*. There, Judge Perry reflected on the importance of ancillary contribution limits to deter evasion of individual limits.

> Although [*Shrink*] does not directly answer the question of whether contribution limits on political parties are evaluated under the same standards applied to contribution limits on individuals, it answers the question indirectly by making clear that their constitutionality hinges on the type of financial support being given to the candidate, not the identity of the contributor: "[R]estrictions on contributions require less compelling justification than restrictions on independent spending." [*Shrink*], 120 S.Ct. at 904 [cites omitted]. . . . Because [*Shrink*] expressly approved Missouri's claimed interests in limiting individual contributions, it follows that the state's corresponding limits on political parties must also be upheld as long as the same rationale applies and they meet the criteria set out in [*Shrink*].

Lamb, 100 F.Supp.2d at 996 (citations omitted). Elsewhere, Justice Kennedy recognized this as well.

> Congress may have the authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in Buckley.

Colorado Republican, 518 U.S. at 630.

Colorado Republican does not bar limits on the amounts political parties may contribute to candidates. That decision struck down federal limits on independent expenditures by political parties, not limits on contributions directly to candidates. See *AkCLU*, 978 P.2d at 626 (noting that Supreme Court's *Colorado Republican* decision addressed independent expenditures, not contributions, and therefore does not apply in analyzing constitutionality of limits on contributions).

Limits on contributions from parties to candidates - like contributions from individuals to parties - cannot be so radical in effect as to render political association between parties and candidates ineffective. *Shrink*, 120 S.Ct. at. 909. *See also Lamb*, 100 F.Supp.2d at 995. In *Lamb*, the limits at issue were comparatively high - roughly $10,000, $5,000, and $2,000 for statewide, house and senate races. *Id.* at 991. In upholding them, the Court observed first that in the period since the Missouri limits became effective, candidates had been quite capable of amassing sufficient funds to run effective races. Second, the court noted that the limits were ten times higher than those found constitutional in *Shrink*. *Id.* at 1000. Given those facts, the court did not see how the limits "could destroy Missouri's burgeoning campaign climate." *Id.*

Act 64's limits on parties -- $400, $300, and $200 - are far more stringent than those upheld in *Lamb*. More stringent, even, than the small scale of Vermont. politics would justify. Political parties speak with a different voice than individuals. Such limits would reduce the voice of political parties town undesirable, and constitutionally impermissible, whisper. For the stability and consistency of our competitive electoral process, parties must continue to function as they have in the past.

Although limits on the ability of a party to contribute money to candidates are vital to deter avoidance of the individual contribution limits, the current limits are too low to pass constitutional muster.

c. Challenge to Sections 2801(5) and 2301-2320.

Act 64 defines political party as "a political party organized under Chapter 45 of this title or any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party." Vt. Stat. Ann. tit. 17, Section 2801(5). Under this definition, all town, county and state committees of a political party are treated as a single entity which is subject to a single contribution limit. This construction of the statute has been confirmed by the Vermont Secretary of State.

Plaintiff Vermont Republican State Committee asserts that the Republican Party of Vermont is not one monolithic party, but a loose federation of independent, autonomous smaller parties. Each of these smaller organizations, Plaintiff contends, should enjoy its own independent rights of speech and association, and therefore should be able to contribute money to candidates up to the permissible limit. Plaintiff therefore argues that Section 2801(5), as interpreted by the Secretary of State, is an

impermissible restriction on the internal organization and composition of the Vermont Republican Party.

By making this argument, however, the Vermont Republican Party proves to be inconsistent with the way it represents itself to the Court. While the State Committee claims that each of these committees is independent from one another and that the State Committee does not control the committees of the counties and towns, it stated in its Amended Complaint that it was bringing this lawsuit "on its own behalf and on behalf of its members, including its candidates, and all Republican town and county committees. Plaintiff VRSC Amended Complaint, at 1. Numerous witnesses confirmed that, despite the complaint's averment that it was brought on behalf of all county and town committees and all Republican candidates, none. of those entities or individuals was asked to vote on or approve the lawsuit by the State Committee.

Furthermore, Vermont is by no means the first government authority to treat state, county and town committees as one for purposes of campaign finance. The federal government treats them as one in its provisions for limits on contributions to federal candidates. *See generally*, 2 U.S.C. Chapter 14 (Federal-Election Campaigns).

Plaintiffs' challenge to 2801(5) and Chapter 45 is without merit.

5. Act 64's Limits on Contributions to and from Political Committees and Organizations, Vt. Stat. Ann. tit. 17, §§ 2805(a) (b), are Constitutional.

Sections 2805(a) and (b) limit contributions from individuals to political action committees (PACs) to $2000, and limit contributions from PACs to candidates to the same levels applied to individuals - $200, $300, and $400 depending on the office.

a. Limits on contributions to PACs are constitutional.

Under *Buckley*, a limit on contributions to PACs is "no more than a corollary of the basic individual contribution limitation." *Buckley*, 424 U.S. at 38 (upholding an aggregate limit of $25,000 on individual contributions to candidates, PACs, and political parties combined based on the potential that would otherwise exist for evasion of the individual contribution limits).

The Supreme Court affirmed this position in *California Medical Association v. Federal Election Commission*, 453 U.S.182, 199 (1981) (plurality opinion) ("*Cal-Med*"); *id.* at 203-04 (Blackmun, J., concurring in part and concurring in the judgment). There, the Supreme Court upheld a $5,000 federal limit on individuals' contributions to multi-candidate PACs, reasoning,

> If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multi-candidate political committee....which advocates the views and candidacies of a number of candidates.

Cal-Med, 453 U.S. at 197 (plurality opinion).

Lower courts have repeatedly followed the Supreme Court's lead in upholding limits on contributions to PACs. *See, e.g., Kentucky Right to Life v. Terry*, 108 F.3d 637 (6th Cir. 1997) (upholding $1500 aggregate annual limit on contributions by an individual to all permanent committees (equivalent to PACs)); *Florida Right. to Life v. Mortham*, No. 98-770-Civ-Orl-19A, slip op. at 21 (M.D. Fla. March 20, 2000) (upholding $500 limit on contributions to political committees); *cf., Russell v. Burris*, 146 F.3d 563, 571 (8th Cir. 1998) (implicitly acknowledging state's right to impose some limit on contributions to political committees, but invalidating limitation of $200 as too low); *Citizens for Responsible Government v. Buckley*, 60 F. Supp. 2d1066, 1088 (D. Colo. 1999) (acknowledging that "the State has a compelling interest in limiting contributions to political committees, but holding that limit of $250 was too low).

Both *Buckley* and *Cal-Med* rejected the argument that limits on contributions to PACs are suspect because of the possibility that they might limit funds that the PAC could spend on matters other than political campaigns. "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.'" *Cal-Med*, 453 U.S. at 197 (plurality opinion) (quoting *Buckley*, 424 U.S. at 21). *Cf. Cal-Med*, 641 F.2d 619, 626 n.5 (9th Cir. 1980)(denying contention that the "effect of the limitation in restricting money spent by-committees for independent expenditures, rather than candidate contributions, should be given serious consideration in evaluating the constitutionality of that limitation."), *aff'd*, 453 U.S. 182 (1981).

In terms of both underlying rationale and application, Act 64's limit on contributions to PACs is consistent with all of the limits that have already withstood constitutional challenge. It is therefore constitutional.

b. Limits on Contributions from PACs to Candidates.

Buckley did not distinguish between individuals and PACs when it accepted the government's anti-corruption justification for FECA contribution limits. 424 U.S. at 38.

Furthermore, Plaintiffs have offered no explanation for why PACs should be treated differently than individuals with regard to the amount that they should be allowed to contribute to political candidates. Indeed, the anti-corruption rationale that supports limits on individual contributions is arguably even stronger when applied to PAC contributions. As their name suggests, PACs exist in order to affect certain political action. The likelihood of actual *quid pro quo* arrangements between PACs and candidates is high; higher, perhaps, than for individual donors and candidates.

Additionally, limiting PAC contributions to candidates is consistent with the goal of deterring circumvention of the individual limits; without a limit on contributions from PACs individuals might well funnel, money in excess of the individual limits to a given candidate.

Because the Supreme Court has not drawn a distinction between PAC contributions and individual contributions for the purposes of First Amendment Analysis, and because the potential for actual or perceived quid pro quo corruption of candidates is high with such contributions, Act 64's limits on PAC contributions to candidates do not violate the First Amendment.

6. Act 64's Limits on Related Expenditures, Vt. Stat. Ann. tit. 17, § 2809, Are Constitutional.

Section 2809 provides that related campaign expenditures made on a. candidate's behalf shall be considered a contribution to the candidate and, if the related expenditure is over $50, it will also count as an expenditure by that candidate. Vt. Stat. Ann. tit. 17, §§ 2809(a) and (b). An expenditure by an individual is only considered related if it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates," and is "intentionally

facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c). An expenditure made by a political party or by a political committee is presumed to be related if it primarily benefits six or fewer candidates who are associated with the party or committee. Vt. Stat. Ann. tit. 17, § 2809(d). The Secretary of State has determined that the presumption is rebuttable by appropriate evidence showing that the expenditure was not intentionally facilitated, solicited, or approved by the candidate.

Consistent with Act 64's regulation of party contributions and PAC contributions, this measure was designed to plug a loophole that would have allowed for circumvention of Act 64's individual contribution limits. Clearly, political candidates should not be able to evade campaign finance regulations simply by asking others to collect and spend money for them. This practice would foil the underlying motivation for the Act completely.

b. Counting Related Expenditures as Contributions is Constitutional.

The Supreme Court has unequivocally stated that unrelated, or "independent," expenditures - regardless of whether they are made by people, PACs or political parties - may not be regulated. *Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) (the Constitution "grants to individuals, candidates, and ordinary political committees the right-to make unlimited independent expenditures."); *see also FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (striking down limit on independent expenditures by PACs); *Buckley*, 424 U.S. at 50 (striking down limit on independent expenditures by any "person"). "Coordinated," or "related"

expenditures, on the other hand, can be regulated. *Buckley*, 424 U.S. at 36-37, 46-47.

> [i]f . . . basic contribution limitations are constitutionally valid, then surely these provisions are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates. The expenditure of resources at the candidate's direction . . . provides material financial assistance to a candidate. The ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the fund raising event or the food .... Treating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign.

Id. at 36-37.[27] In *Colorado Republican Campaign Committee v. FEC* a plurality of the Court confirmed this

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[27] The Buckley Court described the difference between coordinated and independent expenditures as follows:

> Section 608(b)'s contribution ceilings rather than 608(e)(1)'s independent expenditure limitation prevent. attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the. candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

424 U.S. at 46-47.

understanding of Buckley, at least with regard to coordinated contributions of individuals and political committees. 518 U.S. at 624-25.

Act 64's test for whether an expenditure is related is not vague. Under Act 64, expenditures are considered related only when such expenditures have been "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Persons wishing to make expenditures on their own to promote a candidate are completely free to do so in any amounts they desire. With such an explicit standard in place for differentiating between related and independent expenditures, individuals should be able to discern when they are acting in concert with a given candidate or candidate committee and when they are not.

With respect to the application of Section 2809 to PACs and political parties, there is no precedent to support Plaintiffs' argument that related expenditures by PACs and political parties should be entitled greater protection than related expenditures by individuals. Indeed, entitling them to such protection would create precisely the same potential for evasion of direct contribution limits that led the *Buckley*

Court to uphold FECA's challenged limits on coordinated expenditures by individuals. *Buckley*, 424 U.S. at 36-37. To forbid, or even substantially loosen, regulation of party or PAC expenditures that are coordinated with candidates would undermine the purposes of Act 64.

Furthermore, this Court cannot agree with the 10th Circuit's novel ruling in *FEC v. Colorado Republican Federal Campaign Comm.*, 213 F.3d 1221 (10th Cir. May 5, 2000). A panel of the court held that Congress may not place any limits on coordinated expenditures made by political parties. *Id.* at 1223. The Tenth Circuit's holding violates the spirit of both *Buckley* and *Shrink*. In vigorous dissent, Chief Judge Seymour recognized this, pointing out that "the majority creat[ed] a special category for political parties based on its view of their place in American politics, a view at odds with history and with legislation drafted by politicians." *Id.* at 1233. Chief Judge Seymour further opined that "the majority has substituted a paean to its view of the role of political parties for a properly deferential assessment of the constitutionality of limits on coordinated party contributions under applicable Supreme Court authority." *Id.* at 1244.

The majority opinion rejected exactly the type of evidence found to be sufficient in *Shrink* concerning the potential for corruption, and imposed its own view that political parties do not pose any danger of corruption. *Id.* at 1223. *Shrink* directly rejected the contention that government may not act to regulate campaign finance practices absent quid pro quo corruption: "In speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' we recognized a concern not confined to, bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink*, 120 S.Ct. at 905 (quoting *Buckley*, 424 U.S. at 27). In the

current case, this Court has been presented with precisely the evidence accepted by the *Shrink* Court and rejected by the Tenth Circuit in *FEC v. Colorado Republican* -- trial testimony from would-be and actual politicians, as well as expert empirical analysis demonstrating the influence donors have on politicians.

For these reasons Act 64's requirement that related expenditures by political parties, PACs and individuals be counted as contributions to the candidates they help is constitutional.

It should be noted that as a result of this holding, related expenditures so defined by Section 2809 will also be subject to the $200, $300, and $400 contribution limits imposed on individuals and PACs by Section 2805(a).

b. Counting Related Expenditures as Candidate Expenditures Is Unconstitutional.

The Court has already ruled above that regulating the expenditures of candidates is unconstitutional. Therefore, Section 2809(b), which states that if the related expenditure is over $50 it counts as an expenditure by that candidate, is unconstitutional as well.

c. The Rebuttable Presumption, Vt. Stat. Ann. tit. 17, § 2809(d), Is Constitutional.

Section 2809(d) provides that if an expenditure is made by a political party or political committee and supports six or fewer candidates, a presumption is triggered that it is a related expenditure under Act 64. Plaintiffs argue that this presumption is a content-based restriction of speech aimed at discouraging advertisements that are devoted to a small number of candidates, and that as such, it violates the First Amendment.

The Administrative Rule promulgated by the Secretary of State pursuant to the authority granted under Section 2809(f), however, explicitly states that, even with respect to a party or political expenditure targeted to six or fewer candidates, the presumption is rebuttable by appropriate evidence showing that the expenditure was not intentionally facilitated, solicited, or approved by the candidate(s). The Administrative Rule is consistent with the legislative history of Act 64, which shows that the presumption was, at all times, intended to be rebuttable.[28]

Section 2809(d) thus provides nothing more than a guideline to assist in compliance with the statute by political parties and political committees. As such, it is not an impermissible restriction on Plaintiffs' First Amendment rights. In fact, it specifically draws the line between expenditures that can be constitutionally regulated, and those that cannot. It is therefore constitutional.

C. Severability

Vermont law provides that "[T]he provisions of any act are severable. If any provision of an act is invalid, or if any application thereof to any person or circumstance is invalid, the invalidity shall not affect other provisions or applications which. can be given effect without the invalid provision or applications." Vt. Stat. Ann. tit. 1, § 215.

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[28] Representative Terry Bouricius, who sponsored the amendment creating a presumption for expenditures by parties or political committees on behalf of six or fewer candidates, made it clear that this presumption is not conclusive, but rebuttable. Bouricius explained, "you can rebut the presumption. . . . So it's not an absolute." Bouricius also testified that expenditures on behalf of six or fewer candidates were more likely to be part of the campaign.

Plaintiffs have challenged certain parts of Act 64, not the entire law.

Each challenged provision has been examined separately. According to Vermont law, a court must sever only the unconstitutional feature, phrase, or word of a statute leaving the remainder of the statute as an operative whole. Whenever possible, "[t]he unconstitutionality of a part of an Act does not necessarily defeat...the validity of its remaining provisions.. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Veilleux v. Springer*, 131 Vt. 33, 41, 300 A.2d 620, 625 (Vt. 19.73) (quoting *United States v. Jackson*, 390 U.S. 570,585-86 (1968) (striking unconstitutional penalty provision from statute)); *see also Bagley v.. Vermont Dept. of Taxes*, 500 A.2d 223, 226 (Vt. 1985) (severing unconstitutional phrase from otherwise valid statute because court concluded that legislature would have enacted law even if it had lacked the unconstitutional provision); *State v. Stevens*, 408 A.2d 622 (Vt. 1979) (striking word from statute as being unconstitutionally vague in order to effectuate the legislative intent).

Accordingly, the Court concludes that the unconstitutional sections -- Vt. Stat. Ann. tit. 17, §§ 2805(a) and (b) in part, §2805(c), 2805a(a), and 2809 in part -- may be, and are, in accordance with this opinion, severed from the remainder of Act 64.

III. CONCLUSION

Free speech and association are among most revered pillars of our democratic society. In the words of Justice Louis Brandeis: "freedom to think as you will and speak as you think are means indispensable to the discovery and

spread of political truth; ... public discussion is a political duty; and this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 375 (1927). "Virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19. Restrictions on the amount of money people or groups can spend on political advocacy therefore necessarily reduce the quantity and effectiveness of their expression. *Id.*, The exercise of those freedoms by some through large money contributions in our political system threatens to drown out the freedoms of speech and association of so many others - those who cannot make such large contributions. The integrity of our democracy is inextricably bound to the voices of those with lesser means. Thus, the categorical preservation of free speech and association cannot lay waste to our other core democratic values such as effective representation, equal access to the political system, and honest, responsive government.

Act 64 represents a thorough, effective, and -- with the exception of expenditure limits, out-of-state contribution limits, and limits on party contributions to candidates -- entirely constitutional attempt by the Vermont legislature to address the real-world problem of excessive money in politics while keeping inside the philosophical dictates of Buckley. Today, this Court has upheld the Act to the furthest extent that the First Amendment will allow.

Wherefore, the Court rules as follows:

1. Act 64's contribution limits to candidates, Vt. Stat. Ann. tit. 17, §2805(a)-(b), are constitutional as they pertain to individuals.

2. Act 64's expenditure limits, Vt. Stat. Ann. tit. 17, §2805a(a), are unconstitutional.

3. Act 64's 25% limit on out-of-state funds, Vt. Stat. Ann. tit. 17, §2805(c), is unconstitutional.

4. Act 64's $2000 limit on contributions to political parties, Vt. Stat. Ann. tit. 17, §2805(a)-(b), is constitutional. However, the limit on contributions from political parties to candidates, codified at same, is unconstitutionally low. Act 64's definition of state and local parties as one entity pursuant to Vt. Stat. Ann. tit. 17, §§ 2801(5), and 2301 through 2320, is constitutional.

5. Act 64's $2,000 limit on contributions to political committees, and its various limits on contributions by political committees to candidates, Vt. Stat. Ann. tit. 17, §2805(a)-(b), is constitutional.

6. Act 64's regulation of related expenditures, Vt. Stat. Ann. tit. 17, §2809(a)-(c), is constitutional as it relates to candidate contributions, but unconstitutional as it relates to candidate expenditures. Additionally, Section 2809(d)'s establishment of a rebuttable presumption that an expenditure by a political party or political committee is related if it benefits six or fewer candidates, as clarified by the Secretary of State, is constitutional.

7. Defendants are herewith enjoined from enforcing the unconstitutional provisions mentioned above against Plaintiffs.

Dated at Burlington, Vermont this 10th day of August, 2000.

/s/_____

William K. Sessions, III
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos. 00-9159(L), 00-9180(Con), 00-9231(xap), 00-9139(xap), and 00-9240(xap)

MARCELLA LANDELL, et al., *Plaintiffs*,
NEIL RANDALL, et al., *Plaintiffs*,
and VERMONT REPUBLICAN STATE COMMITTEE,
Plaintiff

v.

WILLIAM H. SORRELL, et al., *Defendants*,
and VERMONT PUBLIC INTEREST RESEARCH GROUP, et al., *Defendant-Intervenors*

Before: _____

WINTER, STRAUB, and POOLER, *Circuit Judges*.

(Argued: May 7, 2001
Decided: August 7, 2002
Withdrawn: October 3, 2002
Amended Opinion Issued: August 18, 2004)

Appeal from the entry of a judgment by the United States District Court for the District of Vermont (William K. Sessions, III, *Chief Judge),* reviewing the constitutionality of

Vermont's Act 64, Vt. Stat. Ann. tit. 17, §§ 2801-2883, which imposes expenditure and contribution limitations on campaigns for state office. Our opinion dated August 7, 2002 was withdrawn on October 3, 2002.

We hold today that the Supreme Court's decision in *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*) does not operate as a *per se* bar to campaign expenditure limits; rather, *Buckley* permits spending limits that are narrowly tailored to secure clearly identified and appropriately documented compelling governmental interests. We find that Vermont has established two such compelling interests in support of its expenditure limits (§ 2805a): preventing the reality and appearance of corruption and protecting the time of candidates and elected officials. Nevertheless, we remand for further findings on an aspect of the narrow tailoring inquiry that the District Court did not reach: whether there are less restrictive means of achieving these goals. We also remand for analysis of whether treating related expenditures as candidate expenditures (§ 2809(b)) is constitutionally permissible.

With regard to Act 64's contribution limits (§ 2805), we find that they survive constitutional scrutiny in large part but that Vermont's attempt to limit contributions from out-of-state sources (§ 2805(c)) is unconstitutional. We remand for further consideration of whether Act 64 regulates the ability of political action committees ("PACs") to make independent expenditures (§§ 2801(4), 2805(g)), and if so, whether such regulation is constitutional. Finally, we remand for further findings on whether Act 64's limits on the transfer of money from national political parties to state and local affiliates (§§ 2801(5), 2805(a)-(b)) imposes impermissible burdens on the operation of political parties.

The District Court judgment is affirmed in part, vacated in part, and remanded for further proceedings.

Judge Winter dissents in part in a separate opinion.

TIMOTHY B. TOMASI, Asssistant Attorney General, Montpelier, VT (Richard A. Johnson, Jr., Christopher G. Jernigan, Assistant Attorneys General, Office of the Attorney General, William H. Sorrell, Attorney General, Montpelier, VT, of counsel), for *Defendants-Appellants-Cross-Appellees William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, Robert L. Sand, and Deborah Markowitz.*

BRENDA WRIGHT, National Voting Rights Institute, Boston, MA (Bonita Tenneriello, John C. Bonifaz, Gregory G. Luke, National Voting Rights Institute, Boston, MA; Peter F. Welch, Welch, Graham & Mamby, Burlington, VT; of counsel), for *Intervenors-Defendants-Appellants-Cross-Appellees Vermont Public Interest Research Group, the League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, and Maria Thompson.*

MITCHELL L. PEARL, Langrock Sperry & Wool, LLP, Middlebury, VT (Peter F. Langrock, Langrock Sperry & Wool, LLP, Middlebury, VT; Joshua R. Diamond, Diamond & Robinson, Montpelier, VT; David Putter, Montpelier, VT; Mark J. Lopez, American Civil Liberties Union, New York, NY;

American Civil Liberties Foundation of Vermont; of counsel), for *Plaintiffs-Appellees-Cross-Appellants Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, and Vermont Libertarian Party.*

JAMES BOPP, JR., Bopp, Coleson & Bostrom, Terre Haute, IN (James R. Mason, III, Eric R. Bohnet, Aaron Kirkpatrick, Bopp, Coleson & Bostrom, Terre Haute, IN, of counsel), for *Plaintiffs-Appellees-Cross-Appellants Donald R. Brunelle, Vermont Right to Life Committee, Inc., Vermont Republican State Committee, Vermont Right to Life Committee-Fund for Independent Political Expenditures, and Marcella Landell.*

JANE R. ROSENBERG, Assistant Attorney General, Hartford, CT (Eliot D. Prescott, Assistant Attorney General, Richard Blumenthal, Attorney General, Hartford, CT, of counsel), for *Amici States of Colorado, Connecticut, Maryland, New York, and Oklahoma.*

GILLIAN E. METZGER, Brennan Center for Justice at New York University School of Law, New York, NY (Nancy Northup, Brennan Center for Justice at New York University School of Law, New York, NY, of counsel), for *Amicus Brennan Center for Justice at New York University School of Law.*

STRAUB, *Circuit Judge:*

During his 1997 inaugural address, Vermont's Governor offered the Vermont General Assembly a moment of telling candor: "As I've said before, money does buy

access and we're kidding ourselves and Vermonters if we deny it. Let us do away with the current system." The General Assembly responded by promulgating Act 64, a comprehensive campaign finance reform package. The testimony and statements made during the General Assembly's debate demonstrated that Vermont lawmakers were concerned with more than just the *quid pro quo* corruption that preoccupies much of campaign finance reform. Typically, this fear of corruption has involved the danger that politicians will sell their votes for campaign funds. The Vermont debate highlighted something else that public officials can, and apparently do, offer in exchange for funds: time and access. The General Assembly, together with the State's chief executive, concluded that Vermont needed limitations governing its campaigns for state office with respect to both expenditures and contributions.

This appeal arises from a consolidated suit which brings a First Amendment challenge to key sections of Act 64. The plaintiffs have argued that Vermont's reform violates the First Amendment guarantee of free speech and association in the political realm. At the conclusion of a bench trial, the District Court enjoined the enforcement of Act 64's limitations on expenditures, gifts by non-resident contributors, and contributions by political parties to candidates. The District Court upheld all of Act 64's other contribution limitations, including limits of between $200 and $400 on contributions to candidates by individuals and political action committees, limits of $2000 on contributions to political parties and political action committees, and regulations treating coordinated expenditures by third parties as contributions to a candidate.

All parties have appealed that decision. We are therefore asked to determine whether the First Amendment rights of free speech and political association forbid each of the challenged provisions, including (1) Vermont's campaign expenditure limitations; (2) the contribution limits

applied to candidates; (3) the contribution limits applied to political parties and political associations; (4) the limit on contributions by non-residents; and (5) the regulation of coordinated expenditures by political parties.

After issuance of the original opinion in this case, *see Landell v. Sorrell,* Nos. 00-9159(L), 00-9180(Con.), 00-9231(xap), 00-9139(xap), and 00-9240(xap) (2d Cir. Aug. 7, 2002) (slip op.), in which we upheld in large part both Act 64's contributions limits and its expenditure limits, plaintiffs filed a petition for rehearing *in banc.* We withdrew our original opinion on October 3, 2002, pending further proceedings. *Landell v. Sorrell,* Nos. 00-9159(L), 00-9180(Con.), 00-9231(xap), 00-9139(xap), and 00-9240(xap), 2002 WL 31268493 (2d Cir. Oct 03, 2002). Having reconsidered our holding and taking serious note of the views presented during the rehearing process, we now issue this amended opinion, modifying our holding only with regard to Act 64's expenditure limits. In both instances, our colleague, Judge Winter, has dissented.

As we did in our original opinion, we hold today that the Supreme Court, in *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam), did not rule campaign expenditure limits to be *per se* unconstitutional, but left the door ajar for narrowly tailored spending limits that secure clearly identified and appropriately documented compelling governmental interests.[1] In applying the narrow tailoring test, we hold that

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[1] We draw some support for our interpretation of *Buckley* from the Supreme Court's recent decision in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S.Ct. 619 (2003) (upholding legislation that, inter alia, limited "soft-money" campaign contributions and regulated electioneering communications). We recognize, of course, that *McConnell* addresses contributions rather than expenditures. Nevertheless, the *McConnell* Court, by focusing on political and societal developments since *Buckley*, see *id.* at __, 124 S.Ct. at 648-54, clearly rejected a static approach to campaign finance reform. Just as the *McConnell* Court deferred to Congress' "predictive judgments" about the need for federal regulation of soft-money contributions, *id.* at __, 124

the State has established that the challenged expenditure limits are supported by its compelling interests in safeguarding Vermont's democratic process from (1) the corruptive influence of excessive and unbridled fundraising[2] and (2) the effect that perpetual fundraising has on the time of candidates and elected officials. The evidence considered by the District Court and the Vermont legislature demonstrates that, absent expenditure limitations, the fundraising practices in Vermont will continue to impair the accessibility to elected officials which is essential to any democratic political system. The race for campaign funds has compelled public officials to give preferred access to contributors, essentially requiring candidates to sell their time in order to raise campaign funds. In addition, we affirm the District Court's finding that effective campaigns can be run under Act 64's limits.

Nevertheless, although we reaffirm these aspects of our original holding, we now conclude that a remand is

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S.Ct. at 673 (observing that Congress had "been taught the hard lesson of circumvention by the entire history of campaign finance regulation"), we respect the Vermont Legislature's similar reliance—in enacting regulations on both campaign contributions and expenditures—on its substantial historical experience with campaign finance reform and its informed predictions about Vermont candidate and donor behavior.

[2] Our consideration of these issues could not help but take particular notice of the *McConnell* majority's observation, in a discussion replete with descriptions of the distinct evil of ever larger sums of money in American politics, that many of the corporate soft-money contributions at issue in that case were motivated by the "desire for access." *McConnell*, 540 U.S. at __, 124 S.Ct. at 649. The Court held that "Congress' legitimate interest" in regulating such contributions "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence." *Id.* at __, 124 S.Ct. at 664 (citation and internal quotation marks omitted). The same issues were identified by the Vermont legislature in this case.

necessary for further fact-finding on an aspect of the narrow tailoring inquiry that was not fully considered by the District Court: the crucial question of whether Act 64's expenditure limits provision was the "least restrictive means" of furthering the State's compelling anti-corruption and time-protection interests—or whether there are other less restrictive mechanisms available that might be as effective in satisfying the compelling interests established by Vermont. On remand, the District Court should also consider another question that it did not reach in its original examination of this case—whether treating related expenditures as candidate expenditures is constitutional. We therefore leave in place the District Court's injunction, while remanding for further proceedings.

As for the remaining issues regarding Act 64's contribution limitations, our decision remains the same in all material respects. We hold that all of Vermont's provisions limiting the size of contributions survive scrutiny, including the treatment of a third party's related expenditures as contributions and the application of contribution limitations to political party donations to candidates. We thus affirm the District Court's rulings on contribution limits in part, but vacate and remand for further proceedings insofar as the District Court's injunction prohibits enforcement of the political party limit. We also vacate the judgment and remand for further proceedings on (1) whether the provisions of Act 64 regulate wholly independent expenditures by political action committees ("PACs") and, if so, whether those provisions are constitutional; and (2) the constitutionality of the law's regulation of funds transferred from national political parties to state and local party entities.

Finally, we affirm the District Court's holding that the First Amendment forbids Vermont's attempt to limit campaign contributions by non-residents to no more than 25 percent of the total contributions received. Vermont has asserted no governmental interest sufficient to justify such a

rule.

Due to the number of issues involved in this case, we set out the following table of contents:

[On advice from the Clerk's Office of the U.S. Supreme Court, the Table of Contents has been omitted as reformatting has rendered the pagination inaccurate.]

BACKGROUND

A. Act 64

In 1997, Vermont passed a comprehensive campaign reform act known as Act 64. 1997 Vermont Campaign Finance Reform Act, codified at Vt. Stat. Ann. tit. 17, §§ 2801-2883 ("Act 64" or "the Act"). As enacted, Act 64 is a comprehensive campaign finance reform package, regulating contributions, expenditures, and disclosures related to candidates for state office in Vermont and political organizations that participate in Vermont elections. Section 2805a limits the expenditures that a candidate for office may make during a two-year election cycle. Candidates for statewide office are restricted to varying amounts depending on the position sought, with a candidate for governor limited to $300,000, for lieutenant governor to $100,000, and other statewide offices to $45,000. *See id.* at § 2805a(a)(1)-(3). Candidates for governor and lieutenant governor also have the option of receiving public financing for their campaigns, provided they receive a certain number and amount of "qualifying contributions." *See* §§ 2851-2856. Candidates for state senator and county office are limited to $4000 in expenditures, with state senators permitted an additional $2500 per seat in multi-seat districts. *See id.* at § 2805a(a)(4). Candidates for state representative in single-member districts can spend no more than $2000, and those in two-member districts no more than $3000. *See id.* at § 2805a(a)(5). Incumbent candidates may spend only 85 percent of the permitted amounts, except for incumbents of

the General Assembly who may spend 90 percent. *See id.* at § 2805a(c).

The Act also limits the size of contributions which candidates, political committees, and political parties may receive from a single source during a two-year election cycle. Candidates for state representative or local office may accept no more than $200 from a single source, political party, or political action committee. *See id.* at § 2805(a). Slightly higher limits apply to candidates for state senate or county office ($300) and to candidates for statewide office ($400). *See id.* Political action committees and political parties may accept no contribution greater than $2000. *See id.* For the purpose of all of these contribution limits, a political party's state, county, and local branches (and national and regional affiliates of the party) count as a single unit. *See id.* at § 2801(5).

The Act further imposes limits on the source of such contributions. Although candidates, political parties, and political action committees may accept contributions from out-of-state residents and political organizations, the sum of such amounts may not exceed 25 percent of the total contributions received. *See id.* at § 2805(c).

Finally, the Act treats coordinated expenditures by third parties as both contributions to a candidate (subject to the applicable contribution limits) and expenditures by the candidate (counted against the candidate's permissible budget). *See id.* at §§ 2809(a)-(b). The Act creates a rebuttable presumption that expenditures made by political parties or political action committees that recruit or endorse candidates are related expenditures if they primarily benefit six or fewer candidates. *See id.* at § 2809(d).

The Vermont General Assembly promulgated Act 64 after extensive legislative consideration. Numerous committees considered the Act, holding over 65 hearings with more than 145 witnesses testifying. Moreover, Act 64

was the latest installment of Vermont's century-long effort to safeguard the accessibility and accountability of its elected officials.[3]

The General Assembly closely investigated the history of campaign financing for state races by examining campaign finance summaries for various Senate, House, and statewide races during the period 1978-1996, and reports of spending and contribution patterns in Vermont races. Members of the General Assembly analyzed the current status of Vermont's campaign finance law, including the disintegration of Vermont's voluntary expenditure limits. They also spoke with a range of experienced candidates and experts who provided testimony and data regarding the cost of campaigning, including the cost of travel, staff, materials, mailings, phone calls, and television and radio advertisements. Some of these witnesses described the widespread use of manipulative contribution devices, such as "bundling," which enable special interests to direct large quantities of money by way of individual contributions to particular candidates. Polls demonstrated that citizens held deep reservations and suspicions about the influence of money on the political system, particularly the influence of large contributions. Some witnesses provided testimony detailing the role that big donors have played in advocating

[3] In 1916, Vermont took early steps to ensure the accountability of its elected officials by passing direct primary elections and mandating the post-primary disclosure of candidate expenditures. 1915 Vt. Laws 4, § 22; 1916 Vt. Laws (Sp. Sess.) 4, § 1. In 1961, the legislature adopted mandatory expenditure limits in primary elections, 1961 Vt. Laws 178, and applied those limits to general elections in 1971, 1971 Vt. Laws 259. In 1976, after *Buckley*, Vermont repealed its expenditure limits but continued to limit the maximum contribution that candidates might accept. 1975 Vt. Laws (Adj. Sess.) 188. Over several decades, Vermont witnessed a period of growing disillusionment with its electoral system, and in 1993 instituted a system of voluntary expenditure limits. Former Vt. Stat. Ann. tit. 17, §§ 2841-42 (1991) (repealed 1997).

or blocking particular pieces of legislation in Vermont.

The record considered by the General Assembly demonstrated how the Vermont system of unbridled expenditures has created a situation where public officials are functionally compelled to sell privileged access through the fundraising system. The Vermont legislature explained that this results in a number of related phenomena, including (1) candidates being forced to spend too much time fundraising; (2) fundraising requiring candidates to give preferred access to contributors over non-contributors; and (3) the system of increasing expenditures hindering the robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process.

The evidence adduced in those hearings also demonstrated broad and powerful support among the Vermont electorate for fundamental reform to the State's campaign financing scheme. These legislative hearings culminated in passage of the Act by an overwhelming majority and with strong bipartisan support.

Based on these hearings, reports and data, the General Assembly set forth specific findings which, in its view, indicated the need for comprehensive reform that includes contribution and expenditure limitations in Vermont electoral campaigns.

> The General Assembly finds that:
>
> (1) Election campaigns for statewide and state legislative offices are becoming too expensive. As a result many Vermonters are financially unable to seek election to public office and candidates for statewide offices are spending inordinate amounts of time raising campaign funds.
>
> (2) Some candidates and elected officials,

particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions.

(3) In the context of Vermont, contributions larger than the amounts specified in this act are considered by the legislature, candidates and elected officials to be large contributions.

(4) Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased.

(5) Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors.

(6) In the context of Vermont, contributions scaled in proportion to the size of the electoral district of the office and up to the amounts specified in this act adequately allow contributors to express their opinions, level of support and their affiliations.

(7) In the context of Vermont, candidates can raise sufficient monies to fund effective campaigns from contributions no larger than the amounts specified in this act.

(8) Limiting large contributions, particularly from out-of-state political committees or corporations, and limiting campaign expenditures will encourage direct and small group contact between candidates and the electorate and will encourage the personal

involvement of a large number of citizens in campaigns, both of which are crucial to public confidence and the robust debate of issues.

(9) Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens.

(10) Citizen interest, participation and confidence in the electoral process is lessened by excessively long and expensive campaigns.

(11) Public financing of campaigns, conditioned on an appropriate number of qualifying contributions, will increase citizen participation and will limit the time spent soliciting contributions, and will reduce the need of elected officials to respond to, and provide access to, contributors. As a result candidates will be freed to devote more time and energy to debate of the issues and elected officials will be able to spend more time responding to constituents and to performing their official duties.

(12) Public financing of campaigns, coupled with generally applicable contribution and expenditure limitations, will level the financial playing field among candidates and provide resources to independent candidates, both of which will increase the debate of issues and ideas.

(13) In Vermont, campaign expenditures

by persons who are not candidates have been increasing and public confidence is eroded when substantial amounts of soft money are expended, particularly during the final days of a campaign.

(14) Identification of persons who publish political advertisements assists in enforcement of the contribution and expenditure limitations established by this act.

(15) Because it is essential for all candidates to have their names and positions on issues known to the electorate and because incumbents have a substantial advantage in these areas, public grants and campaign expenditures must be reduced for incumbents.

1997 Vt. Laws P.A. 64 (H. 28). On June 26, 1997, Vermont's Governor signed Act 64 into law.

B. Procedural History

The current suit was consolidated from three separate civil actions. On May 18, 1999, Marcella Landell, Donald R. Brunelle, and the Vermont Right to Life Committee, Inc., sued Vermont's Attorney General, Secretary of State and fourteen state's attorneys ("Vermont"). On August 13, 1999, Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, and the Vermont Libertarian Party also brought suit, as did the Vermont Republican State Committee on February 15, 2000. The remaining defendants, including the Vermont Public Interest Research Group, the League of Women Voters of Vermont, and numerous members of Vermont's General Assembly (collectively "Defendant-Intervenors"), successfully intervened in the

consolidated action.[4]

Plaintiffs argued that the challenged provisions unconstitutionally infringe their First Amendment rights to free speech and political association.[5] The District Court held a ten-day bench trial between May 8, 2000 and June 2, 2000. An array of former and current public office holders, private citizens, and electoral experts testified about Vermont's interest in campaign finance legislation, the history of elections and campaign finance reform in Vermont, the cost of campaigning in Vermont, and the likely effect of Act 64's challenged provisions on Vermont races, candidates and political actors. As we discuss in more detail below, the ten-day bench trial resulted in the District Court's upholding most of the challenged provisions, but striking down Act 64's expenditure limitations, its limitations on contributions by parties to candidates, and its restriction on contributions from out-of-state sources. Vermont and the other defendant-appellants timely appeal from the District Court's order

[4] A previous lawsuit challenged other provisions of Act 64 which required (1) disclosure of who pays for "political advertisements" and the candidate, party or political committee "on whose behalf" the advertisement is published or broadcast; and (2) reporting of expenditures of "mass media activities . . . which included the name or likeness of a candidate for office" occurring within 30 days of a primary or general election. Vt. Stat. Ann. tit. 17, §§ 2881 - 2283. See Vermont Right to Life Committee v. Sorrell, 221 F.3d 376 (2d Cir. 2000).

[5] Plaintiff Neil Randall is an incumbent representative in the Vermont legislature. Plaintiff George Kuusela is chairman of the Windham County Republican Party and has run for state legislative office. Plaintiff John Patch is chair of the Chittenden County Democratic Party and has plans to run for State Senate. Plaintiff Steven Howard was previously a candidate for State Auditor and a former state representative. Plaintiff Libertarian Party is a political party in Vermont and ran 44 candidates for office in 1998. Plaintiff Jeffrey Nelson is a longtime resident of Vermont and a financial supporter of the Republican Party. The plaintiffs also include the Vermont Right to Life Committee, the Vermont Republican State Committee, and various additional individuals.

holding those portions of Act 64 unconstitutional. Vermont is joined by *amici,* the Brennan Center for Justice at New York University School of Law and the States of Colorado, Connecticut, Maryland, New York, and Oklahoma. The plaintiffs have cross-appealed, contending that the District Court should have also enjoined the enforcement of the other disputed provisions of the Act.

C. The District Court's Decision

After receiving post-trial submissions, the District Court issued an opinion containing its findings of fact and conclusions of law. *See Landell v. Sorrell,* 118 F. Supp. 2d 459 (D. Vt. 2000). First, the District Court held that the plaintiffs have standing to challenge the subject provisions of the Act. *Id.* at 475. As to the merits, although the District Court found that Vermont had generally demonstrated several compelling justifications for Act 64's comprehensive reform of the campaign finance system, the court concluded that some of Act 64's provisions violated the First Amendment. With the exception of the expenditure limitations, the District Court applied the standard of review of "exacting scrutiny," inquiring whether the provision is narrowly tailored to serve a sufficiently important governmental interest. With regard to the expenditure limits, the District Court interpreted *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam), as forbidding such limitations *per se* and held that any contrary decision would violate the doctrine of *stare decisis.* 118 F. Supp. 2d at 483. The District Court rejected the expenditure limitations despite its findings that Vermont had established several compelling interests in their favor, namely: (1) freeing office holders from the requirements of excessive fundraising so that they can perform their duties; (2) preserving faith in democracy; (3) protecting access to the political arena for those unable to access large sums of money; and (4) diminishing the importance of repetitive 30-second commercials. *Id.* at 482-83. Despite holding that the expenditure limitations are

illegal under *Buckley,* the District Court did find that the expenditure limits would permit effective campaigning. *Id.* at 471-72.

The District Court upheld the provisions imposing limitations on amounts that individuals may contribute to political campaigns, Vt. Stat. Ann. tit. 17, §§ 2805(a)-(b). The District Court found that the Vermont provision, like the statutory provision upheld in *Buckley,* served the governmental interest in preventing actual and perceived corruption in the political system. *Id.* at 476-79. As evidence of the existence of such an interest, the District Court relied on citizen polls, comments by public officials, and media accounts of citizen concern with the state of the political system, as well as direct testimony from citizens regarding their views of the political system. *Id.* at 465-70. The evidence indicated that the current financing scheme eroded public confidence in the democratic system and contributed to a waning public interest in elections. *Id.* Finally, the evidence supported the public's perception that large contributions won actual influence over the legislative process. Again, the District Court relied not only on trial testimony, but also on studies showing how the pressure to raise money made legislative initiatives less likely to succeed if contrary to the wishes of well-organized interest groups who frequently contribute to candidates. *Id.*

The District Court further analyzed the amounts of the contribution limitations, and held that they were narrowly tailored to serve this anti-corruption purpose. In support of the narrow-tailoring conclusion, the court relied upon the cost of previous elections in Vermont, the size of Vermont electoral districts and the corresponding cost-per-voter, the effect of the limitations on the Burlington mayoral election held after the passage of Act 64, the widely-held public view that donations in excess of the Act's limitations were suspicious, and the fact that the limitation did not inhibit "effective campaigning." *Id.* at 470-72, 476-80.

The District Court rejected the contention that PACs merit special treatment; it thus upheld the restrictions on contributions by and to PACs pursuant to Act 64. *See* Vt. Stat. Ann. tit. 17, §§ 2805 (a)-(b). If contributions by individuals may be restricted, the court reasoned, then so too may gifts by individuals to associations that in turn give funds to candidates. The District Court reasoned that Vermont has the same anti-corruption interest in limiting PAC contributions as those by individuals. The contribution limit closes a loophole which individuals could exploit to evade individual contribution limitations. *Id.* at 488-89.

The District Court held, however, that political parties deserve greater freedom in their ability to make contributions to political candidates. Although the District Court upheld the $2000 limitation on contributions to political parties pursuant to Vt. Stat. Ann. tit. 17, § 2805(a), it struck down the provision limiting contributions to candidates insofar as it applies to those candidate's own political parties pursuant to Vt. Stat. Ann. tit. 17, § 2805(b). *Id.* at 486-87. Regarding contributions to political parties, the court relied on Vermont's anti-corruption interest, noting that unrestrained contributions to parties provided a loophole to individuals wishing to evade restrictions on direct contributions. Quoting *Nixon v. Shrink Mo. Gov't PAC (Shrink)*, 528 U.S. 377, 397 (2000), the District Court found that the limit imposed by the statute is not "so radical in effect as to render political association ineffective, drive the sound of [a political party's] voice below the level of notice, and render contributions pointless." 118 F. Supp. 2d at 485. Moreover, the District Court found that, given Vermont's electoral situation, the $2000 limit did not inhibit the strength of political parties. The court relied on the evidence specifically concerning Vermont campaigns and politics, a comparison of limits on contributions to candidates in other jurisdictions, and the ability of the Republican Party to raise substantial sums while subject to Act 64's limitations. *Id.* at

484-86. The District Court, however, did not address the constitutionality of transfers of money to state and local parties from the national affiliated party, which are apparently subject to the $2000 limitation.

The District Court held that Vermont's limits on how much a political party could give to its own candidates for various state offices ($400, $300, and $200, respectively) were unconstitutionally low. *Id* at 487. The court recognized that the anti-corruption interest may justify some limitations, given that corruption may "filter[] through the party machine." *Id.* at 486. But according to the District Court, those limitations must be balanced against the special role political parties play in the American electoral system. Without much factual discussion, the court concluded that the limits would reduce the party's voice to a whisper—since political parties speak through their candidates and the restrictions were too stringent even for the small scale of Vermont's electoral races. *Id* at 487.

The District Court also upheld the treatment of state and local parties as a single entity for the purpose of calculating the contribution limitations pursuant to Vt. Stat. Ann. tit. 17, §§ 2801(5) & 2301-20. The court relied on a number of factors, including the fact that notwithstanding its adamant assertions, the defendant Vermont Republican State Committee had never acted as a loose confederation of entities in the conduct of the litigation. *Id.* at 487-88.

The District Court upheld the provision of Act 64 that treats third party expenditures "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee" as contributions to the candidate pursuant to the Act. *See* Vt. Stat. Ann. tit. 17, § 2809(a) & (c). The purpose of the provision is to close a loophole which would otherwise permit evasion of the legitimate contribution limitations by engaging in coordinated expenditures. The District Court further upheld the provision

establishing a rebuttable presumption that any third party expenditure benefitting six or fewer candidates is a related expenditure. *See id.* at 2809(d). The court explained that the presumption is a guideline to assist in compliance, and that since Vermont's Secretary of State has determined that the presumption is rebuttable, it does not unduly chill otherwise protected speech activity. *Id.* at 492. Although the District Court upheld the provision treating related expenditures as contributions to candidates, it struck down the provision treating related expenditures as expenditures by candidates. Vt. Stat. Ann. tit. 17 § 2809(a) & (b).

The District Court found unconstitutional the provision that caps out-of-state funds at 25 percent of total contributions received by a candidate, political party, or PAC pursuant to Vt. Stat. Ann. tit. 17, § 2805(c). The court found that the factual record did not establish any legitimate governmental interest in limiting such contributions. *Id.* at 483-84. Instead, the record only supported an inference that such contributions raise the risk of corruption when they are large—a problem solved by the contribution limits. The fact that a donor is a resident of another state is not an important factor in either increasing the risk of corruption or the public's perception of corruption. Moreover, the mechanics of the ban indicated a lack of proper tailoring because it acts as a complete bar to contributions by some would-be contributors.

Finally, the court held that, under Vermont law, the unconstitutional provisions may be severed from the rest of Act 64. *Id.* at 492-93.

DISCUSSION

As a threshold matter, the defendants have challenged the plaintiffs' standing to assert this facial challenge to Act 64's expenditure and contribution limitations. In order to present a "case or controversy" within the meaning of Article III of the Constitution, the plaintiffs

seeking relief must have a sufficient "personal stake in the outcome of the controversy." *Buckley v. Valeo,* 424 U.S. 1, 11 (1976) (internal quotation marks omitted). The District Court provided careful analysis demonstrating that each of the challenged provisions arguably affects the First Amendment rights of one or more of the plaintiffs. *See Landell v. Sorrell,* 118 F. Supp. 2d 459, 474-76 (D. Vt. 2000). For the reasons set forth by the District Court, we uphold its determination that the plaintiffs have standing to assert their challenge to Act 64's expenditure and contribution limits.

Although we review the District Court's factual findings for clear error pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, *see Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 498 (1984), the District Court's legal conclusions regarding the campaign finance reform legislation are subject to *de novo* review. Indeed, the breadth of review of factual issues is greater in cases raising First Amendment issues: "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 284-286 (1964)). The appellate court must also be vigilant for errors of law that "may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp.,* 466 U.S. at 501.

In reviewing campaign finance regulations, "the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association." *Federal Election Comm'n v. Beaumont,* 539 U.S. 146, 161 (2003) (internal quotation marks omitted). Campaign contributions advance political association by allowing one to affiliate with a political candidate, and "enabl[ing] like-minded persons to pool their resources in furtherance of common

political goals." *Buckley,* 424 U.S. at 22. However, restrictions on contributions have been treated as merely "marginal" speech restrictions because contributions "lie closer to the edges than to the core of political expression." *Beaumont,* 539 U.S. at 161. As a result, contribution limits pass muster if they are "closely drawn to match a sufficiently important interest." *Id.* at 162 (citations and internal quotation marks omitted). And, as the Supreme Court recently observed, its cases "have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." *McConnell,* 540 U.S. at __, 124 S.Ct. at 660; *see also id.* at __, 124 S.Ct. at 657 n.40 (explaining that since *Buckley,* the Court has "consistently applied less rigorous scrutiny to contribution restrictions aimed at the prevention of corruption and the appearance of corruption") (collecting cases).

However, "limits on political expenditures deserve closer scrutiny than restrictions on political contributions." *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.,* 533 U.S. 431, 440 (2001) *(Colorado Republican I); see also McConnell,* 540 U.S. at __, 124 S.Ct. at 655. The Supreme Court has treated limits on campaign spending as a direct restraint on speech, and thus, expenditure limits must be narrowly tailored to serve a compelling state interest. *See Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 657 (1990) (addressing corporate expenditures).

With these standards in mind, we review each of the challenged provisions in turn.

I. Act 64's Expenditure Limitations

A. The Rule of *Buckley*

Buckley v. Valeo remains the seminal case governing the constitutional review of campaign finance reform efforts, including expenditure limitations. 424 U.S. 1

(1976). The *Buckley* Court considered and rejected a variety of expenditure limitations, including a ceiling on independent, campaign-related expenditures, a ceiling on a candidate's use of personal or family resources, and a ceiling on a candidate's campaign expenditures. Like the federal statute reviewed in *Buckley,* Act 64 limits the total amount of campaign funds that a candidate may spend.

Although the clear language of *Buckley* requires that courts should review expenditure limits with exacting scrutiny, the District Court in this case (and it is by no means alone) apparently felt that *Buckley* categorically prohibits expenditure limitations. *See, e.g., Homans v. City of Albuquerque,* 366 F.3d 900, 914-21 (10th Cir. 2004); *Kruse v. City of Cincinnati,* 142 F.3d 907, 918-19 (6th Cir.), *cert. denied* 525 U.S. 1001 (1998); *see also post* at **[7], [9], [25], [55], [88]** (Winter, dissenting). We disagree. The *Buckley* Court's rejection of particular federal campaign expenditure limitations was rooted in Congress' purported reasons for such legislation and the failures of those interests to demonstrate any need for expenditure limits. 424 U.S. at 55-58. Ultimately, the Court concluded that the federal government had failed to assert any sufficiently important interest that its expenditure limitations served. *See id.* at 55.

Examining the federal government's interest in eliminating corruption from federal elections, the *Buckley* Court concluded that the government's asserted rationale only applied to large contributions—that is, eliminating large contributions fully satisfied the government's anti-corruption interest. *See id.* at 56-57. The federal government claimed that expenditure limitations were necessary to make contribution limitations easier to enforce, arguing that when candidates cannot spend large quantities of money, they have a weaker incentive to accept illegally large contributions. But the Court concluded that the contribution limitations promised to be sufficiently effective on their own. *See id.* Based on the Court's review of the record, "[t]here [was] no

indication that the substantial criminal penalties" attached to violations of contribution limits, as well as the "political repercussion of such violations," would not suffice to realize this anti-corruption interest. *Id.*

Nor was the Court persuaded that the federal government had a sufficient interest in utilizing expenditure limitations to equalize the financial resources of candidates competing for office. *See id.* at 56-57. The contribution limits would assure that any difference in resources "var[ies] with the size and intensity of the candidate's support." *Id.* at 56. Finally, the Court addressed the argument that expenditure limitations served the federal government's interest "in reducing the allegedly skyrocketing costs of political campaigns." *Id.* at 57. The Court rejected the idea that the state had a sufficient interest in setting the appropriate scope of the "quantity and range of debate on public issues in a political campaign." *Id.* In other words, *Buckley* held that large campaign expenditures, in and of themselves, are not inherently suspect.

We conclude, then, that Vermont cannot sustain Act 64 by asserting a need to control excessive campaign spending *per se*. But critically, the *Buckley* Court did not conclude that the Constitution would always prohibit expenditure limits, regardless of the reasons asserted and the record supporting the limitations. It simply held that based on the record before it, "[n]o governmental interest that has been suggested is sufficient to justify" the federal expenditure limits. *Id.* at 55. Accordingly, after *Buckley,* there remains the possibility that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review.

We are not alone in concluding that *Buckley* does not permanently foreclose any consideration of campaign expenditure limitations. In *Shrink,* Justices Breyer, Ginsburg

and Stevens all recognized that our post-*Buckley* experiences with campaign finance have demonstrated that we need a flexible approach to the constitutional review of campaign finance rules. Justice Breyer, who was joined by Justice Ginsburg, concluded that courts must resist a static reading of *Buckley*'s mandate, which may require reinterpretation in light of subsequent experience, including a legislature's "political judgment that unlimited spending threatens the integrity of the electoral process." 528 U.S. at 403-04 (Breyer, J., concurring). Legislatures may protect the electoral process not only from quid pro quo corruption, but also from the threat that campaign funding may pose to the "integrity of the electoral process." *Id.* at 401. Justice Stevens also articulated the need for "a fresh reexamination" of *Buckley,* and concluded that "Money is property; it is not speech." *Id.* at 398 (Stevens, J., concurring). And although Justice Kennedy argued from a different perspective that the post-*Buckley* experience requires a wholesale abandonment of the approach adopted in *Buckley,* he too left open the possibility that "Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions thus permitting officeholders to concentrate their time and effort on official duties rather than on fundraising." *Shrink,* 528 U.S. at 409 (Kennedy, J., dissenting); *see also McConnell,* 540 U.S. at __, 124 S.Ct. at 745 (Kennedy, J., concurring in part and dissenting in part) (indicating by implication that *Buckley* did not make expenditure limits *per se* invalid).[6]

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[6] Unease with *Buckley* is not limited to those who argue that campaign finance regulations have a proper place in our constitutional system. In Shrink, Justices Thomas and Scalia both advocated overruling *Buckley* not to give legislatures greater leeway to pass needed campaign finance reform, but to heighten the constitutional review given to contribution limits. 528 U.S. at 410-12 (Thomas, J., joined by Scalia, J., dissenting); see also *McConnell*, 540 U.S. at __, 124 S.Ct. at 737 (Thomas, J., concurring in part and dissenting in part). Justice Kennedy has expressed sympathy for their view. Shrink, at 409-10 (Kennedy, J., dissenting); cf.

Indeed, some judges have noted that reconsideration might be required were a court faced with compelling evidence that unlimited expenditures posed great dangers to the very political process that *Buckley* sought to safeguard. Justices Stevens and Ginsburg have supported the constitutionality of spending limits on political parties for, among other reasons, the likelihood that such limits would improve, rather than inhibit, a flourishing political system:

> It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fundraising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment. *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 649-50 (1996) *(Colorado Republican I)* (Stevens, J., dissenting). In part, they reached this conclusion because of the comparative competency of

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McConnell, 540 U.S. at __, 124 S.Ct. at 755-56 (Kennedy, J., concurring in part and dissenting in part) (characterizing *Buckley*'s "unworkable" distinction between limits on contributions and limits on expenditures as having created an "awkward and imprecise test").

More recently, in their respective *McConnell* dissents, Justices Scalia, Kennedy and Thomas observed with dismay that the *McConnell* majority went even further than the Court had gone in *Buckley*. See *McConnell*, 540 U.S. at __, 124 S.Ct. at 729 (Scalia, J., concurring in part and dissenting in part) (characterizing the majority as "having abandoned most of the First Amendment weaponry that *Buckley* left intact"); *id.* at __, 124 S.Ct. at 742 (Kennedy, J., concurring in part and dissenting in part) ("To reach today's decision, the Court surpasses *Buckley*'s limits and expands Congress' regulatory power."); *id.* at __, 124 S.Ct. at 730 (Thomas, J., concurring in part and dissenting in part) (accusing the majority of building upon the errors of *Buckley* by "expanding the anticircumvention rationale beyond reason"). Hence, it would be unrealistic for us to fail to notice the Court's expanding views.

> the different branches of government: "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Id.* at 650. Moreover, one judge sitting on the Sixth Circuit has pointed out that *Buckley* was "decided on a slender factual record" and that a fuller record might satisfy the constitutional requirement that expenditure limits be narrowly tailored to a compelling interest. *Kruse,* 142 F.3d at 919 (Cohn, J., concurring); *cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-27, at 1133 n.1 (2d ed. 1988) ("One consequence of th[e] expedited review [in *Buckley]* was that the Supreme Court, working in a factual vacuum, was forced to indulge in more than a little empirical speculation about such issues as the circumvention of expenditure limits and the impact of those limits on campaign speech."); Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform,* 37 WASHBURN L.J. 1, 30 (1997) ("Since the *Buckley* Court's judgment was made without the benefit of a factual record, critics have argued that it is time for a factually based study of the potential for corruption inherent in large, independent expenditures."); David R. Lagasse, Note, *Undue Influence: Corporate Political Speech, Power and the Initiative Process,* 61 Brook. L. Rev. 1347, 1357 (1995) ("The Supreme Court granted certiorari in *Buckley v. Valeo* without either party to the action having the opportunity to develop a strong factual record on which the Court could base its ultimate decision. Thus, the Court faced the issue of Congress's power to regulate campaign expenditures purely on theoretical grounds, without the benefit of developing an adequate factual record.") (citing BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 469-70 (1979)).

The academic literature also contains persuasive analyses that our post-*Buckley* understanding of campaign finance requires a careful evaluation of the evidence in support of expenditure limits. *See, e.g.,* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning*

of the End of the Buckley Era?, 85 MINN. L. REV. 1729, 1765-69 (2001) (arguing that fair and competitive elections may require some form of expenditure limitations); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1288-89 (1994) (noting that changed circumstances and never-before considered governmental interests, including the protection of candidates' time, might be sufficiently compelling to support expenditure limits).

Although we recognize that there is considerable dissatisfaction with *Buckley*'s approach, we still premise our conclusions on the assumption that *Buckley* continues to govern the constitutional review of campaign finance laws. However, we do not accept an unyielding interpretation of *Buckley* that expenditure limits are *per se* unconstitutional, because such a static approach to *Buckley*'s import would require us to ignore not only *Buckley*'s own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy.[7] In sum, like the federal expenditure limitations considered in *Buckley*, Act 64's expenditure limitations rise or fall on whether they have been narrowly tailored to a compelling governmental interest. It is to that question that we now turn.

B. The Requisite Level of Scrutiny

As a regulation of the amount that a candidate can spend on speech made "for the purpose of influencing an election," Vermont's expenditure limits are a content-based

[7] The arguments to the contrary that are raised by the dissent largely reprise those presented by Senator Buckley and like-minded commentators in the early 1970s. While some of those arguments were then successful, they failed to result in having the Supreme Court hold that expenditure limits are *per se* unconstitutional—a fact that our dissenting colleague disputes.

restriction on speech. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992) (treating election provision as content-based because "whether individuals may exercise their free speech rights . . . depends entirely on whether their speech is related to a political campaign").[8] "Content-based regulations are presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), and the government bears the burden of rebutting that presumption. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). To uphold a content-based restriction on speech, the government must prove the existence of a compelling state interest to support the restriction, and that the restriction is narrowly tailored to advance that interest.

In the context of expenditure limits, then, the level of scrutiny applied is akin to the "strict scrutiny" standard frequently employed in the equal protection context, in terms of the required degree of "fit" between means and ends. *Cf.* Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 112-13 n.94 (citing cases) (noting that, traditionally, judicial review has been at its strongest in protecting against infringement on First Amendment rights). Our application of this standard is informed both by the particular First Amendment right implicated by the challenged

[8] Some scholars think that such regulations are more properly classified as "content-neutral." See, e.g., Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. CHI. L. REV. 413, 517 n.151 (1996) ("I treat the expenditure ceilings in *Buckley* as content neutral, as is the norm, because they cover spending for expression supporting all political candidates. It could be argued, however, that the ceilings imposed a subject-matter limitation because they applied only to spending in political campaigns.") (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-27, at 1132-36 (2d ed. 1988)).

restrictions, as well as by the degree of deference owed to the supporting legislative findings.

Turning to the first of these factors, there is no doubt that "[p]olitical speech is the primary object of First Amendment protection." *Shrink,* 528 U.S. at 410-11 (Thomas, J., dissenting). Moreover, in our representative democracy, the free exchange of political information "should receive the most protection when it matters the most—during campaigns for elective office." *Id.* at 411. However, the precise object of First Amendment protection in this case, for most plaintiffs, is the ability to spend money on political speech—not the speech itself. *See Shrink,* 528 U.S. at 400 (Breyer, J., concurring) (money is not speech; it *"enables* speech"). To be sure, the Supreme Court has consistently held that the expenditure of money is so critical in enabling political speech in today's mass society, that it should receive the same First Amendment protection as the speech itself. We do not question this proposition—and indeed apply it in this case—but, particularly in light of at least one Supreme Court Justice's willingness to rethink the money equals speech equation (J. Stevens concurring in *Shrink,* 528 U.S. at 398), think it important to define the protected interest as precisely as possible.

Although most of the plaintiffs are persons or organizations that want to spend money on speech, plaintiff Marcella Landell is a voter who wants to receive political speech. Her First Amendment right to receive such speech is the equivalent of the right of the speakers. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756 (1976) (the First Amendment protection afforded is to "the communication, to its source and to its recipients both"). As Landell describes her interest in her brief, she "does not wish her ability to cast a wise and informed vote to be restricted by the State of Vermont imposing a direct barrier on the amount of candidate speech she may receive." Restrictions of political

speech that "hamstring[] voters seeking to inform themselves about the candidates and the campaign issues" are unconstitutional. *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 223 (1989). Plaintiffs argue that this high level of protection, as applied in *Buckley,* dictates that the expenditure limit provision must automatically be struck down.

On the other hand, Vermont appears to argue that deference to the legislature—on whether the interests asserted in favor of expenditure limits are compelling, and whether expenditure limits are necessary to achieve these goals—is warranted. Vermont cites several Supreme Court cases in support of its view of legislative deference, including *Federal Election Comm'n v. National Right to Work Comm.,* 459 U.S. 197, 210 (1982) (it is improper to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 665 (1994) *(Turner I)* ("courts must accord substantial deference to the predictive judgments" of the legislature); *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 196 (1997) *(Turner I)* ("We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power."); and *Walters v. National Association of Radiation Survivors,* 473 U.S. 305, 330-31 n.12 (1985) (Congress' factual findings are entitled to "a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on" an issue). Indeed, the District Court concluded that "[a]lthough legislative findings are not entirely isolated from review," it was "required to exercise considerable deference to such findings." 118 F. Supp. 2d at 476 (citing *Turner II).* Accordingly, the court adopted the fifteen official findings excerpted *supra* and in the District Court opinion, but made clear that it was also considering the other evidence presented at trial. *Id.* at 468-74.

As to plaintiffs' position, we disagree that the high level of protection accorded political speech or the money enabling it dictates that the provision must automatically be struck down. *Cf. McConnell,* 540 U.S. at __, 124 S.Ct. at 706 ("Many years ago we observed that '[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.'") (quoting *Burroughs v. United States,* 290 U.S. 534, 545 (1934)); *Storer v. Brown,* 415 U.S. 724, 729-30 (1974) (compelling interest in the integrity and stability of the election process means that "every substantial restriction on the right to vote or to associate" should not automatically be invalidated). In our view, this level of protection is the starting point, not the endpoint, for scrutiny of Vermont's expenditure limits.

Indeed, the Supreme Court has been clear in its rejection of the view that "strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 519 (1980) (Marshall, J., concurring)) (explaining that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases"). This observation has proven true in the First Amendment context, as the Supreme Court has validated a number of electoral regulations against First Amendment challenge even while applying strict scrutiny. *See, e.g., Burson v. Freeman,* 504 U.S. 191 (1992) (plurality opinion) (upholding state ban on electioneering activity near polling places); *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990) (upholding statute restricting independent expenditures by corporations on campaigns). Careful analysis is particularly important in applying strict scrutiny, where, as Justice Breyer has put it, "a law significantly implicates competing constitutionally protected interests in

complex ways." *Shrink,* 528 U.S. at 402 (Breyer, J., concurring). As we will explain, this is a case where "constitutionally protected interests lie on both sides of the legal equation," preventing a simple equation of strict scrutiny with constitutional infirmity. *Id.* at 400; *see also, e.g., Burson,* 504 U.S. at 199 (plurality opinion) (recognizing compelling interest in preserving integrity of electoral process); *id.* at 213 (Kennedy, J., concurring) ("[T]here is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right."); *Storer,* 415 U.S. at 736 (allowing some restrictions on ballot access in order to further the "State's interest in the stability of its political system").

Nor should we adopt total legislative deference as the appropriate level of scrutiny. Deference to legislative findings may well be warranted on certain issues relating to the constitutionality of election-related laws, such as the precise level of contribution limits, as in *Buckley,* 424 U.S. at 30, or whether 100 feet, as opposed to 50 or 75 feet, is an adequate radius surrounding a polling place to ban electioneering, as in *Burson,* 504 U.S. at 209-10. Some degree of deference on the issue of whether there are state interests that justify legislative changes to the State's electoral system may also be appropriate. *See, e.g., Federal Election Comm'n v. Beaumont,* 539 U.S. 146, 155 (2003) ("[D]eference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages."). But total deference is not warranted on the core questions of whether those interests are truly compelling enough, in a constitutional sense, to justify the expenditure limits, and whether this regulation places an undue burden on the First Amendment rights of those who bring this challenge. *See, e.g., Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 519 (1981) (plurality

opinion) ("[I]t has been this Court's consistent position that democracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgment in this area . . .. "); *Schneider v. State,* 308 U.S. 147, 161 (1939) ("This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. . . . [T]he delicate and difficult task falls upon the courts . . . to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.").

We read the District Court opinion as consistent with this view. It gives "considerable deference" to the legislative findings on the need for the law only, but not to the legislature's assessment of whether its solution is narrowly tailored. *Cf. Regents of University of California v. Bakke,* 438 U.S. 265, 299 (1978) (Powell, J.) ("Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant.") (quoted in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 224-25 (1995)). This approach is consistent with Justice Breyer's concurrence in *Shrink,* where he indicated that the Court should "defer to [the Missouri legislature's] political judgment that unlimited spending threatens the integrity of the electoral process," but not with respect to whether "its solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge." 528 U.S. at 403-04.

Although we bear in mind Justice Breyer's observations in *Shrink,* we cannot adopt his conclusion, in light of the extensive Supreme Court precedent to the contrary, that the interests must be balanced here, and that there is therefore "no place" for a "strong presumption against constitutionality of the sort often thought to

accompany the words 'strict scrutiny.'" *Id.* at 400. Such a presumption is proper, at least until the Supreme Court tells us otherwise, and it means that the burden of persuasion at trial was on the State to defend Act 64—*i.e.,* to establish that there was a compelling state interest to support the expenditure limit provision and that the provision was narrowly tailored to advance that interest. *See Burson,* 504 U.S. at 226 (Stevens, J., dissenting, joined by O'Connor and Souter) (noting that "a core premise of strict scrutiny" is that "the heavy burden of justification is *on the State")* (emphasis in original). But this burden does not excuse the courts from actually applying the scrutiny that the First Amendment demands, and the State of Vermont deserves.

Therefore, although we do not question the validity of the factual findings developed by the legislature in support of Act 64,[9] our system of judicial review provides plaintiffs the opportunity to present competing evidence, assigns to the District Court the responsibility for making findings of fact and conclusions of law after weighing the evidence, and leaves to the Court of Appeals the independent responsibility to assess the legal significance of these factual findings. This responsibility is particularly important here, where, as plaintiffs claim, complete deference to the legislature could "risk such constitutional evils as permitting incumbents to insulate themselves from effective electoral challenge." *Shrink,* 528 U.S. at 402 (Breyer, J., concurring.)

Put differently, this level of scrutiny is a serious barrier for expenditure limits, but it is not impenetrable. Rather, an independent court must be convinced that the legislature was serving the people's interest and not its own. *See, e.g., Burson,* 504 U.S. at 213 (Kennedy, J., concurring)

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[9] *See, e.g., City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500 (1989) (plurality opinion) ("The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary.") (citing *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 488-89 (1955)).

(discussing the use of the compelling-interest test as "one analytical device to detect, in an objective way, whether the asserted justification is in fact an accurate description of the purpose and effect of the law") *(quoted in R.A.V. v. City of St. Paul,* 505 U.S. 377, 395 (1992)); *Cf. Croson,* 488 U.S. at 493 (noting in the equal protection context that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool," with the narrow tailoring analysis helping to ensure that there is "little or no possibility that the motive for the classification was illegitimate").

C. Compelling Interests

In *Shrink,* the Court indicated that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." 528 U.S. at 391. For example, the Court in *Shrink* accepted a relatively minimal evidentiary showing of Missouri's interest in preventing corruption or the appearance thereof, because in its view, there was "little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id.* at 395; *see also McConnell,* 540 U.S. at __, 124 S.Ct. at 661 ("The idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible."). Similarly, the *Shrink* Court relied in large part on *Buckley* 's conclusion on the fit between contribution limits and the anti-corruption interest, to decide that the contribution limits in Missouri were sufficiently tailored and not "so different in kind as to raise essentially a new issue about the adequacy of the Missouri statute's tailoring to serve its purposes." 528 U.S. at 395.

With *Shrink*'s guidance on "the quantum of empirical evidence needed" in mind, we turn then to the interests asserted by Vermont in support of Act 64's expenditure limits to assess whether any of the interests might be sufficiently compelling to support this regulation of political speech. Vermont offers five interests that it argues are sufficiently compelling to support the spending limits on candidates: (1) "avoiding the reality and appearance of corruption in elective politics and government"; (2) "assur[ing] that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties"; (3) promoting "electoral competition and in protecting equal access to political participation"; (4) "bolster[ing] voter interest and engagement in elective politics"; and (5) "enhanc[ing] the quality of political debate and voters' understanding of the issues."

Defendants-intervenors appear to rely primarily on the first two of these interests to support the spending limits—describing those interests as (1) deterring corruption and the appearance of corruption; and (2) permitting candidates and officeholders to spend less time fund-raising and more time interacting with voters and performing duties. Defendants-intervenors also argue that the third interest asserted by the State—"protecting political equality"—should be recognized as an "additional basis" to support the spending limits on candidates.[10]

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[10] Amicus Brennan Center for Justice, arguing in favor of the spending limits, relies on the interest of "prevent[ing] the demonstrably corrosive effects of uncontrolled campaign spending on the democratic process." Amicus further characterizes "uncontrolled campaign spending" as a problem that "harms the quality of democratic representation," that is "undermining faith in the democratic process," and that "has a harmful impact on voter turnout." Amici States rely on the first three interests identified by Vermont, and also relied upon by intervenors, described as (1) "eliminat[ing] corruption and the appearance of corruption in the

We now consider the interests asserted by the defendants.

1. Anti-Corruption

The Supreme Court has recently clarified that the anti-corruption interest, in the campaign finance context, is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389; *see also McConnell*, 540 U.S. at __, 124 S.Ct. at 660. Moreover, the *Shrink* Court reiterated that, in addition to the *actual* influence of campaign contributions on politicians' behavior, the *perception* of corruption was an important part of this compelling state interest because it "could jeopardize the willingness of voters to take part in democratic governance." *Shrink*, 528 U.S. at 390 (citing *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961) (democracy works "only if the people have faith in those who govern")).

In terms of "the quantum of empirical evidence needed," we note that although the interest in avoiding corruption and the appearance thereof is well-established as sufficiently important in the context of contribution limits, the rejection in *Buckley* of the anti-corruption interest as a constitutional justification for spending limits dictates the need for considerable evidence to demonstrate that unlimited spending is part of the corruption problem, and that spending limits are a necessary and plausible solution.

In this case, the District Court found that Vermont

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political process"; (2) "ensur[ing] that officeholders can spend less time fund-raising and more time performing their duties" and (3) "bolster[ing] equal access to political office and restor[ing] the public's confidence in the electoral system."

had proven that the reality and perception of corruption in its political system was a legitimate concern. Specifically, it found that "[e]vidence at trial overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics," and "it appears they have reason to feel that way," 118 F. Supp. 2d at 468, concluding that "[t]he record suggested that large contributors often have an undue influence over the legislative agenda." *Id.* In light of *Shrink*, this "undue influence" over the legislative agenda is properly considered part of the anti-corruption interest. *See* 528 U.S. at 389.[11] For the reasons that follow, our independent review of the evidence supports these findings by the District Court.

First, citizens in Vermont have consistently demonstrated a belief that the attention of their public representatives may be available for a price. As a result, public faith in the democratic system has declined. The General Assembly described the effects of a need to raise ever growing amounts of funds: "Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased." 1997

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[11] Reiterating points it had already made in *Buckley* and Shrink, the Supreme Court in *McConnell* clearly held that large campaign donations—even the so-called "soft-money" contributions at issue in *McConnell*—"can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders." *McConnell*, 540 U.S. at __, 124 S.Ct. at 661. The *McConnell* majority observed that during the 1996 and 2000 campaigns, "more than half of the top 50 soft-money donors gave substantial sums to both major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology." *Id.* at __, 124 S.Ct. at 663 (emphasis in original); see also *id.* at __, 124 S.Ct. at 649 (citing evidence that "many corporate contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties").

Vt. Laws P.A. 64 (H.28) (finding No. 4). "Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens." *Id.* (finding No. 9). At trial, one expert witness, Celinda C. Lake, concluded that "[v]oters are extremely concerned about the influence of special interests in the political process." In fact, according to polling data, nearly 75 percent of Vermont voters say that ordinary voters do not have enough influence over Vermont politics and government, and more than two thirds believe that "large corporations and wealthy individuals have too much influence." (expert report of Celinda C. Lake).

Testimony by Vermont's elected officials revealed that this disenchantment and loss of public faith played a critical role in their belief that expenditure limits are necessary. One sponsor of Act 64, Representative Karen Kitzmiller, presented the Vermont House of Representatives with evidence showing that 94 percent of Vermonters believe that too much money is spent in politics, and 76 percent believe that ending private contributions would "reduce the power of special interest groups." Another state legislator, Gordon Bristol, testified at trial about his concern "about the regular guy on the street, and I think if they feel that candidates are spending a modest amount of money, that they are going to get candidates in there who are representing issues and not a special interest . . . ." According to another legislator, citizens have reported that they do not vote because "'[a]ll the big money controls everybody in Montpelier anyways.' . . . They think it's all wrapped up and that the special interests control it and, quite frankly, they aren't that wrong." (testimony of Elizabeth Ready). Another legislator said: "[I]t's the monied interests that control the process, and that cynicism . . . it keeps people from

participating, from engaging . . . ." (testimony of Donald Hooper).

Second, because of the limited number of campaign contributors and the constant concern of being outspent, candidates and elected officials are significantly influenced in deciding positions on issues by a belief that they are unable to oppose too many special interests, no matter how unpopular, because they will be cut off from funds. The General Assembly described the effects of a need to raise ever growing amounts of funds: "Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors." 1997 Vt. Laws P.A. 64 (H.28) (finding No. 5). If legislation alienates one major special interest group, officials are reluctant to alienate others because the number of entities and people making political contributions is finite and small. One state legislator admitted that, when considering a piece of legislation, "You have to initially consider it as whether or not you want to risk losing the financial support or, in the worst case, having that financial support go to a primary opponent or to a person who opposes you in a general election." (testimony of Peter Smith). One candidate recalled being told by another lawmaker: "We've already lost the drug money [because of the pharmacy bill], and I don't need to lose the food manufacture money too. So I'm not going to sign the bill." (testimony of Cheryl Rivers).

Third, and perhaps most perniciously, the demands of fundraising also affect the behavior of elected officials in the context of agenda-setting, since officials pay attention to which contributor "wants what to happen in terms of language of the bill, in terms of calendaring the bill, in terms of writing the rules." (testimony of Peter Smith). That same witness also noted that a crucial part of any deliberation on a bill involves speculation about the reaction of contributors because they control the money: politicians are forever

asking "what's the industry position, what's the union position, what's—you know, and what they're talking about is where [is] the money behind the issue, what does the money want, where is the conflict between and among the power brokers." Senator Rivers testified that campaign contributors, by virtue of their role as contributors, can dominate the attention of party leadership or a committee chair, and thereby influence the legislature's agenda. In her words, "there is kind of an atmosphere that is created that there is [an] assumption that phone calls [of contributors] will get taken and [their] policy issues will be considered." Another senator, Elizabeth Ready, recognized that "there is an agenda out there that is pretty much set by folks that are not elected."[12] Candidates, often with great reluctance, accept the bargain with contributors so that they do not lose large sources of potential fundraising for the "arms race" in

[12] This phenomenon was also chronicled by the *McConnell* Court, which quoted one former Senator as admitting that members of Congress "have limited amounts of time" but do make themselves available to meet with those who give "large sums." *McConnell,* 540 U.S. at __,124 S.Ct. at 664 (citations and internal quotation marks omitted). The same former Senator went on to explain that those meetings are "not idle chit-chats about the philosophy of democracy . . . . Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way." *Id.* at __, 124 S.Ct. at 664-65 (citations and internal quotation marks omitted).

Our dissenting colleague criticizes Vermont's reliance on this type of anecdotal evidence but the Supreme Court expressly credited similar testimony in *McConnell* where, as here, the record was "replete" with anecdotal examples of the type of access-peddling that concerned Congress. *McConnell,* 540 U.S. at __, 124 S.Ct. at 664. The *McConnell* Court specifically observed the type of "particularized evidence of improper influence" required by our dissenting colleague, *post* at **[101]**, would be particularly hard to come by. "Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize." *McConnell,* 540 U.S. at __, 124 S.Ct. at 666.

which they feel compelled to participate.

The evidence at trial established that candidates for public office rely on special interests for financial support, produced directly or by way of "bundling" smaller contributions from a particular company or industry.[13] The *Buckley* Court seemed to assume that many small contributions could not raise the specter of corruption. "If a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication?" 424 U.S. at 56 n.64 (internal quotation marks omitted). But the reality of campaign financing in Vermont is a far cry from this idyllic vision of political fundraising, in large part because not every voter has the financial ability to participate by giving campaign contributions. "[T]he average Vermonter has been,

[13] Although Judge Winter criticizes Act 64's proponents' reliance on the phenomenon of "bundling" or "pooling" contributions as a justification for the legislation, see post at [89-93], we note that the *McConnell* Court lauded Congress' similar efforts to anticipate, document, and respond to candidates', donors' and parties' evolving strategies for circumventing existing campaign finance reforms. See *id.* at __, 124 S.Ct. at 661 ("[T]he First Amendment does not require Congress to ignore the fact that candidates, donors, and parties test the limits of the current law.") (citation and internal quotation marks omitted). Indeed, for example, no sooner had the *Buckley* Court construed federal law to cover "express advocacy," did the political spending system create "issue advertising." See *id.* at __, 124 S.Ct. at 650-52. Similarly, elaborate schemes involving the "solicitation, transfer, and use of soft money" grew out of FECA's imposition of limitations on the source and amount of contributions of "federal" or "hard" money. *Id.* at __, 124 S.Ct. at 648-50. The *McConnell* Court recognized that such new developments—and Congress' general awareness of the realities of campaign fundraising—quite correctly had moved Congress to legislate. See *id.* at __, 124 S.Ct. at 665-66. Clearly, bundling practices allow donors to achieve indirectly what contribution limits prevent them from doing directly. We do not diminish the legislature's reliance on this concern because, like the Supreme Court, we refuse to take a "crabbed view of corruption, and particularly of the appearance of corruption." *Id.* at __, 124 S.Ct. at 665.

to some degree, disenfranchised because the average Vermonter cannot afford the price of admission." Senate J. of the State of Vt., at 1338 (Biennial Session, 1997) (statement of William T. Doyle).

Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it corrupts the process for achieving accessibility and accountability of state officials and candidates. The evidence at trial demonstrated that money—and the special interests that wield it—has a great influence on candidate behavior in Vermont, at the expense of the electorate as a whole, since candidates depend on it in order to run for office. Where access and influence can be bought, citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power. *See Jacobus v. Alaska,* 338 F.3d 1095, 1113 (9th Cir. 2003) (describing the phenomenon of "access-peddling" and explaining that it "creates a danger of corruption and the appearance of corruption"). The accessibility and accountability of public officials—and the public's faith that Vermont's government is accessible and accountable—are fundamental to any democratic system.

In our view, such influence of campaign contributors is pernicious because it is bought. Certain private citizens and organizations should not be given greater access to public office holders—and thus greater influence—*on account of* those citizens' ability and willingness to pay for candidates' campaigns. Even with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention *because* the contributors will pay for their campaigns. Quid pro quo corruption is troubling not because certain citizens are victorious in the legislative process, but because they achieve the victory by paying public officials for it.

In short, we believe, based on the District Court's findings and our own independent review of the record, that Vermont has proven the strength of this interest, and its relationship to unlimited campaign spending. And we believe that the factual record developed by Vermont in support of the anti-corruption interest, through the legislative process and at trial, may be sufficient to distinguish *Buckley. Cf. Colorado Republican I,* 518 U.S. at 617-18 (plurality opinion) (indicating that "the lack of coordination between the candidate and the source of the expenditure . . . prevents us from assuming, *absent convincing evidence to the contrary,* that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.") (emphasis added); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 863-64 (1992) (citing *West Coast Hotel and Brown v. Board of Education* as examples of "applications of constitutional principle to facts as they had not been seen by the Court before"). Nonetheless, given *Buckley*'s holding rejecting the anti-corruption interest as inadequate to support the expenditure limits at issue in that case, we are reluctant to conclude that the same general interest, standing alone, is sufficiently compelling to support Act 64's expenditure limits. *See Buckley,* 424 U.S. at 46-48; *see also McConnell,* 540 U.S. at __, 124 S.Ct. at 647. We turn then to the second interest asserted by defendants.

2. Time Protection

Vermont also submits that it has a compelling interest in "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties." Indeed, the District Court found that "the need to solicit money from large donors at times turns legislators away from their official duties." 118 F. Supp. 2d at 468. The District Court also indicated that the State proved that this concern exists, and that Vermont's

expenditure limits addressed this interest, among others. *Id.* at 482-83

Again, we are mindful of *Shrink*'s guidance that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[14] 528 U.S. at 391. On this score, the "time protection" rationale has been recognized as compelling, although not in the context of candidate spending limits. Indeed, the *Buckley* Court considered this interest in assessing, and deemed it sufficiently important to support, the public financing scheme for Presidential election campaigns—a provision it upheld. *See* 424 U.S. at 96 ("Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions") (citing Senate Rep. No. 93-689); 424 U.S. at 91 ("Congress was legislating for the 'general welfare' . . . to free candidates from the rigors of fundraising."). *See also Republican Nat'l Committee v. Federal Election Comm'n,* 487 F. Supp. 280, 284-86 (S.D.N.Y.) (three-judge District Court) (upholding constitutionality of expenditure limits as condition of accepting presidential public financing in part on ground that it would "give candidates the opportunity to lessen the 'great drain on (their) time and energies' required

[14] Amicus Brennan Center also points to evidence nationally that "raising necessary campaign funds has turned into a full-time job for many candidates and officeholders." And there is consensus among the five amici states—including Connecticut and New York—that "[a]lthough the States have a compelling interest in ensuring that the demands of fundraising not drain elected officials of the time and attention necessary to carry out their official duties, they are not succeeding." We find it significant that all three states that make up our Circuit have expressed concern over the all-consuming nature of unrestrained fundraising.

by fundraising 'at the expense of providing competitive debate of the issues for the electorate'") (quoting Senate Rep. No. 93-689), *aff'd* mem., 445 U.S. 955 (1980).

Moreover, other circuits have more recently recognized the compelling nature of the time-protection interest in similar contexts. *See Rosenstiel v. Rodriguez,* 101 F.3d 1544, 1553 (8th Cir. 1996), *cert denied,* 520 U.S. 1229 (1997) (upholding Minnesota's voluntary public financing scheme because the government has a compelling interest in reducing "the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning"); *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26, 39 (1st Cir. 1993) (holding that statute survives exacting scrutiny because Rhode Island has "a valid interest in having candidates accept public financing because such programs 'facilitate communication by candidates with the electorate' [and] free candidates from the pressures of fundraising.") (quoting *Buckley,* 424 U.S. at 91). Indeed, the *Rosenstiel* court determined that it is "well settled" that this interest is compelling. 101 F.3d at 1553 (collecting cases).

The *Buckley* Court, in determining that the expenditure limits in that case were unconstitutional, alluded to this time-protection interest only in passing. 424 U.S. at 91, 96 (mentioning generally Congress' desire to relieve political candidates from the "rigors" of soliciting and fundraising); *see also* Blasi, *supra,* at 1285-86 & n.15 ("[D]uring the public and legislative debates that led to the passage in 1974 of mandatory spending limits for congressional races, and during the *Buckley* litigation which resulted in the invalidation of those limits, candidate time protection was almost wholly ignored as a justification for campaign spending limits."). Only Justice White, concurring in part and dissenting in part, observed that imposing "expenditure ceilings" would "ease the candidate's understandable obsession with fundraising, and so free him

and his staff to communicate in more places and ways unconnected with the fundraising function. *Buckley,* 424 U.S. at 264-65 ("There is nothing objectionable—indeed it seems to me to be a weighty interest in favor of the provision—in the attempt to insulate the political expression of federal candidates from the influence inevitably exerted by the endless job of raising increasingly large sums of money."). One commentator explains that "candidate time protection was not at the center of either the reform agenda or the constitutional analysis" because *Buckley* was decided"[b]efore the advent of pervasive war chests and candidate-PAC merchandizing bazaars."[15] Blasi, *supra,* at 1287.

Plaintiffs argue that this interest is no different than the goal of reducing the "skyrocketing costs of political campaigns," rejected by *Buckley* as an insufficiently compelling interest to support expenditure limits. 424 U.S. at 57. The Sixth Circuit agreed in *Kruse,* reasoning that "[t]he need to spend a large amount of time fundraising is a direct outgrowth of high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending." 142 F.3d at 916-17. We are unpersuaded by this reasoning.

Indeed, we think the language of *Buckley,* as well as an examination of the *Buckley* briefs, oral argument, and subsequent commentary from judges and scholars, precludes such an interpretation. In its discussion of the federal campaign expenditure ceilings at issue in *Buckley,* the *Buckley* Court explained that the limits "appear to be

[15] Moreover, *Buckley* could not have anticipated the whole range of individual concerns faced by specific states, such as Vermont, given those states' unique experiences with state-level campaign finance reform in the three decades since *Buckley* was decided.

designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns," and cited the statistics put forward by appellees and appellants on how the percentage increase in campaign spending in recent years compared to the rise in the consumer price index, gross national product, and total expenditures for commercial advertising over the same time period. 424 U.S. at 57. The Court concluded that, regardless of the import of such statistics, "the mere growth in the cost of federal election campaigns *in and of itself* provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns." *Id.* (emphasis added). Particularly in light of the recent statements of three Justices indicating that this "time protection" rationale may be a compelling interest, *see supra* at **[25-26]** (quoting *Shrink,* 528 U.S. at 409 (Kennedy, J., dissenting); and *Colorado Republican I,* 518 U.S. at 649-50 (Stevens, J., joined by Ginsburg, J., dissenting)), we see no reason to read *Buckley* more broadly than its language indicates.

At trial, Vermont presented powerful evidence concerning the time pressures which the prospect of unlimited expenditures places on candidates for office. In particular, there is strong evidence that unlimited expenditures have compelled candidates to engage in lengthy fundraising in order to preempt the possibility that their political opponents may develop substantially larger campaign war chests. The Vermont General Assembly found that such fundraising by candidates requires an "inordinate[] amount of time." 1997 Vt. Laws P.A. 64 (H.28) (finding No.1). The large, and growing, campaign war chests in Vermont have created strong pressures on elected officials to ensure that they can raise funds comparable to any opponent. One witness, former State Senator and Lieutenant Governor Peter Smith, described the "stampede or nuclear arms race mentality that we currently have, which is just keep building

the bank because you never know what's going to happen." Under the current system, Vermont candidates feel like "you had two races you were running. The first was for the money . . . ." (testimony of Donald Hooper).

Although there may be no inherent problem with candidates competing to raise large quantities of funds, the evidence in Vermont is clear that the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time. Special interests, well placed to take advantage of candidates' fear of losing this fundraising war, dominate candidates' time and thereby have been able to exercise substantial control over the information that passes to candidates. They do this by increasingly consuming the opportunities candidates have for meeting with constituent groups and forcing candidates to choose contributors over private citizens who make small or no contributions. This command of available time, inherent in endless fundraising, drastically reduces opportunities that candidates have to meet with non-contributing citizens.[16]

Legislators explained at trial that officials are more likely to return donors' phone calls. "If I have only got an hour at night when I get home to return calls, I am much more likely to return [a donor's] call then I would [a non-donor's] . . . . [W]hen you only have a few minutes to talk, there are certain people that get access." (testimony of Elizabeth Ready). A former candidate for Congress and current lobbyist in Vermont, Anthony Pollina, described the process:

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[16] The General Assembly minced no words when describing this phenomenon: "Some candidates and elected officials, particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions." 1997 Vt. Laws P.A. 64 (H.28) (finding No.2).

> [C]andidates and policymakers . . . can only talk to so many people in a day. They can only respond to so many phone calls. The governor can only have so many meetings in a day. And if in fact large contributors are using their contributions to buy access to the governor or other policymakers . . . then that means that the policymaker, the governor and others are not spending their time talking to other people who have not provided other large contributions. . . .

Nor is this just a theoretical concern. One widely reported case involved the differing access that state officials granted to interested groups as the state government considered whether to label milk produced using genetically engineered hormones. Major dairy companies, who in the past had been contributors, were able to arrange meetings with critical state leaders, whereas local farmer organizations that lacked importance as contributors could not arrange similar meetings.

By giving money, contributors "haven't bought the person, but they have certainly bought a piece of that time there where they have that person's attention." (testimony of Elizabeth Ready). Even if candidates receive valuable information during every hour spent fundraising, their time is being controlled by those with campaign cash, and this effect is corrosive. The Vermont legislature considered one article in the Burlington Free Press stating that "[m]oney not only threatens to corrupt the process, it sabotages the political dialogue as well. Candidates spend too much time begging for dollars and too little time talking issues . . . ." *See Democratic Process Relies on Reform,* Burlington Free Press, Oct. 6, 1997 at 6A.

Public officials testified at trial that the financial necessity imposed by fundraising, and bred by the "arms race" mentality in campaigns with unlimited spending,

requires that elected officials spend time with donors rather than on their official duties. One state Senator testified that legislators have to spend time at party fundraising events to give donors access to elected officials. (testimony of Cheryl Rivers). Another Senator explained how spending limits would affect her time:

> If I can go out and raise what I have to raise and know that those limits are in place, I can spend the whole rest of my campaign, once I have raised that money, out with the public, okay. I can go door-to-door. I can go around to local events. I can go to the county fairs. I can have a little booth, you know, and be talking to people. I am not going to be locked away, you know, in the Democratic Party somewhere or in my own office somewhere
>
> making fundraising calls. (testimony of Elizabeth Ready).

Simply put, every hour spent drumming up financial contributions is an hour that cannot be spent independently studying legislative proposals or meeting with constituents who may not be likely donors. And the public understands this reality: at trial, Vermont presented survey data that 85% of Vermonters are concerned that "political fundraising took away time from important government business." (testimony of Celinda C. Lake).

Indeed, although we do not balance interests, the fact that this time-protection interest is itself fundamental to our representative democracy, and related to First Amendment values, cannot be ignored. As one First Amendment scholar put it, the quality of democratic representation suffers "when legislators continually concerned about re-election are not able to spend the greater part of their workday on matters of constituent service, information gathering, political and policy analysis, debating and compromising with fellow representatives, and the public dissemination of views." Blasi, *supra*, at 1282-83.

Unfortunately, without spending limits, the contribution limits would exacerbate the time problem. A lobbyist who supports Act 64 noted that contribution limits coupled with unlimited expenditures would require that candidates "continue to spend more time and energy raising those smaller contributions to see who could raise the most money and outspend their opponent and therefore win the race. So the spending limits, tied to the contribution limits, create a situation where the candidates simply don't have to spend as much time and energy raising money. . . . [The limits] change the way campaigns are run, in a sense, and make them more people oriented or voter oriented as opposed to fundraising oriented . . . ." (testimony of Anthony Pollina). *Cf. McConnell,* 540 U.S. at __, 124 S.Ct. at 656 ("The 'overall effect' of dollar limits on contributions is 'merely to require candidates and political committees to raise funds from a greater number of persons.'") (quoting *Buckley,* 424 U.S. at 21-22). That same lobbyist also explained that with contribution limits alone, "the unfortunate thing is that candidates would feel compelled to look for those other sources because they would still be trying to outspend . . . their opponents, and that would cause them to then spend more time and more energy into looking for those other sources of funding. It might then encourage the bundling practices that were referred to earlier, and . . . it would not address the problem that we are hoping to address." (testimony of Anthony Pollina).[17]

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[17] Our dissenting colleague challenges our deference to the Vermont legislature with respect to its predictions about the effect that Act 64's contribution limits, standing alone, would have on candidate behavior. See post at [97-108]. Such "predictive judgments" by a legislature, however, should be accorded "substantial deference . . . , particularly when, as here, those predictions are so firmly rooted in relevant history and common sense." *McConnell*, 540 U.S. at __, 124 S.Ct. at 673 (citation and internal quotation marks omitted); see also supra at [46

In sum, our independent review of the evidence adduced at trial supports the District Court findings that "the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time interacting with voters," and that "the need to solicit money from large donors at times turns legislators away from their official duties." 118 F. Supp. 2d at 468, 470. So long as the danger remains that a political opponent might severely outstrip a candidate's financial resources, candidates have continued to feel it necessary to raise ever larger sums of money. For elected officials, this will mean giving more time to contributors over non-contributors, and expending more effort on relatively generous contributors over less important ones.

3. Conclusion: Two Compelling Interests

Faced with this evidence and the resulting findings of the District Court, we conclude that Vermont has established at least two interests in maintaining campaign expenditure limits: preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials. In this case, Vermont's well-documented interest in time-protection is particularly compelling when considered in tandem with the State's firmly-rooted interest in preventing corruption (or the appearance thereof). *Cf. Miller v. Johnson*, 515 U.S. 900, 921 (1995) (leaving open question whether "compliance with the [Voting Rights] Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination").[18] Regardless of

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n.14] (noting the consensus among the amici states that this time-protection interest is not unique to Vermont).

[18] It further appears that the two interests analyzed here—anti-corruption and time protection—overlap and might be better described as one interest—"to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action." *Shrink*, 528 U.S. at 401 (Breyer, J.,

whether one finds Vermont's justifications novel, the quantum of evidence demonstrating the depth of the problem in Vermont campaigns is great. The drive for campaign funds has created a situation where candidate time is effectively for sale. As a democracy, Vermont has a compelling interest in ensuring that its representatives' time is not available only—or mostly—to the people who are willing and able to pay for it. Fundamentally, Vermont has shown that, without expenditure limits, its elected officials have been forced to provide privileged access to contributors *in exchange for* campaign money. Vermont's interest in ending this state of affairs is compelling: the basic democratic requirements of accessibility, and thus accountability, are imperiled when the time of public officials is dominated by those who pay for such access with campaign contributions.

Because we conclude that Vermont has established two interests that, taken together, are sufficiently compelling to support its expenditure limits, we need not consider the other interests asserted by the State. Specifically, we need not consider whether the interest in encouraging electoral competition and protecting the ability of non-wealthy Vermonters to run for state office in Vermont is sufficiently compelling. And we do not need to reach the question of whether Vermont has sufficiently compelling, independent interests in (1) bolstering voter interest and engagement in elective politics; and (2) encouraging public debates and other forms of meaningful constituent contact in place of the

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concurring), or, as amicus Brennan Center puts it, to "protect the quality of democratic representation." Since defendants did not defend Vermont's law on the basis of such an interest, however, and the Supreme Court has not relied on such an interest in its recent analyses of the constitutionality of campaign finance laws, we do not explicitly assess that interest here. We do note that this interest appears to underlie, in part, both of the interests asserted by the State—anti-corruption and time protection for candidates and elected officials—that we do analyze.

growing reliance on 30-second commercials. We do note that the first of these interests is properly considered part of the anti-corruption interest, and the second relates to the time-protection rationale.

D. Narrow Tailoring

Our analysis next requires a determination as to whether the particular limits are narrowly tailored to serve the compelling interests offered. Because mandatory expenditure limits are so rare, and the Supreme Court and federal courts of appeals that have considered the constitutionality of expenditure limits have found no compelling interests sufficient to support them, no court has reached the narrow tailoring question in this context. Thus, we are in largely uncharted waters.

Plaintiffs argue that even if there is a compelling interest to support Act 64's spending limits, the spending limits are not narrowly tailored. They argue that the spending limits are too serious an impingement on First Amendment rights, without significantly advancing the interests asserted by the State. Because the District Court held that mandatory spending limits are *per se* unconstitutional under *Buckley,* it never fully reached the narrow tailoring inquiry, although it did address the subsidiary question of whether candidates could run effective campaigns under the rubric of "narrow tailoring." 118 F. Supp. 2d at 470-72.

The parties present the narrow tailoring issue as whether the expenditure limits are sufficiently high to allow candidates to run effective campaigns. Indeed, in our initial consideration of this case, we assumed that the parties were correct in focusing the narrow tailoring question on the ability of a candidate to run an "effective campaign." We now believe, however, that the narrow tailoring inquiry is broader, and that answering the question requires remand to the District Court. We write further to explain the nature of the narrow tailoring inquiry required.

The narrow tailoring inquiry examines the "fit" between means and ends. Here, the question is whether mandatory spending limits will significantly advance the State's time-protection and anti-corruption interests, without severely burdening the First Amendment rights of the plaintiffs. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 265 (1986).

In order to satisfy the "narrow tailoring" standard, the government must also prove that the mechanism chosen is the least restrictive means of advancing that interest. *See, e.g., Playboy Entertainment Group, Inc.,* 529 U.S. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."); *Universal City Studios, Inc. v. Corley, 273* F.3d 429, 450 (2d Cir. 2001) ("Content-based restrictions are permissible only if they serve compelling state interests and do so by the least restrictive means available.").[19] When the First Amendment demands strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy Entertainment Group* , 529 U.S. at 813; *Sable Communications of Cal., Inc., v. FCC,* 492 U.S. 115,

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[19] One commentator has described the Supreme Court's narrowly tailoring requirement this way: "The narrow-tailoring prong, then, involves essentially factual questions about whether the law is indeed narrowly drawn: Does the law further the interest; is the law limited to speech that implicates the interest; does the law cover all such speech; are there less restrictive alternatives that will serve the interest equally well?" Eugene Volokh, Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny, 144 U. PA. L. REV. 2417, 2424 (1996) (footnotes omitted).

126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."); *see also Boos v. Barry,* 485 U.S. 312, 329 (1988) (concluding that government regulation at issue was not narrowly tailored because "a less restrictive alternative is readily available"); *California Democratic Party v. Jones,* 530 U.S. 567, 585-86 (2000) (observing, in dicta, that California's "blanket" partisan primary system was not a narrowly tailored means of furthering asserted state interests because "a *nonpartisan* blanket primary" would advance the same interests "without severely burdening a political party's First Amendment right of association").

Accordingly, answering the narrow tailoring question requires addressing three different issues: (1) the extent to which the State's interests are advanced by the regulation; (2) the extent to which candidates can conduct "effective advocacy" under the limits; and (3) whether the government has proven the absence of less restrictive alternatives that are as effective in advancing its compelling interests, while impinging less on First Amendment rights.

1. Are Vermont's time-protection and anti-corruption interests advanced by campaign spending caps?

Plaintiffs argue that the spending limits do not actually advance the interests asserted by the State because the limits are set at the equivalent of current levels of spending, and when considered in combination with the contribution limits, actually force candidates and elected officials to spend more time and attention on fundraising, not less. For the reasons that follow, we disagree and conclude that the spending limits are likely to advance both the time-protection and anti-corruption interests asserted by the State.

First, we do note the apparent tension between seeking to reform the political process by imposing expenditure limits, yet setting limits based on current candidate expenditure patterns in an effort to approximate the spending needs of such candidates. We believe, however, that this tension is more apparent than real. Indeed, plaintiffs' argument misunderstands the driving force behind the spending limits. The evidence at trial, including the evidence from legislative hearings, indicated the widespread presence of an "arms race" mentality. The record in Vermont demonstrates that often it is this potential of being vastly outspent that creates powerful and deleterious pressures to raise funds. The significance of the spending cap lies not in reducing the amount of money spent on campaigns, but rather in eliminating this potential of being vastly outspent that leads to the "arms race" mentality among candidates and elected officials.

Limiting the arms race promises to have a direct impact on the time of candidates and elected officials. Indeed, the witnesses' testimony at trial supported the idea that reducing the arms race mentality, spending limits would allow candidates and elected officials to focus more time on issues. One elected official shared her sense of how spending limits will liberate public officials: "[The spending limit] lessens the pressure. . . . I am not going to be locked away . . . in the Democratic Party somewhere or in my own office somewhere making fundraising calls." (testimony of Elizabeth Ready). Another State Senator, and a sponsor of Act 64, testified that "I would hope that it's going to give folks running for office more of an opportunity to go out and engage the voters on the issues." (testimony of Cheryl Rivers). And William T. Doyle, another senator, testified that without the need to raise such large sums of money "there will be increased time for real debate . . . candidates will be able to concentrate more on issues rather than raising public money."

The "arms race" mentality—and its effect on the behavior of candidates and elected officials—is also quite relevant to the anti-corruption interest, and helps explain why the spending caps also address this "threat from politicians too compliant with the wishes of large contributors." *Shrink,* 528 U.S. at 389. The evidence presented at trial indicated that the agenda of candidates and elected officials is affected by the perceived need to raise increasing amounts of funds. Because the sources of campaign money are necessarily limited, candidates are reluctant to alienate potential fundraising constituencies. This affects what issues are put on the agenda, what issues are taken off, and how certain issues are addressed. With spending caps, this calculus changes to a certain extent. For example, with a limit on how much money can be spent, elected officials testified that they would be more willing to take a position which a particular industry opposed. (testimony of State Sen. Cheryl Rivers; testimony of former Congressman and Lt. Governor Peter Smith).

Plaintiffs also argue that Act 64's expenditure limits do not advance the interest in reducing the time dedicated to fundraising because Act 64, as a whole, actually forces candidates to devote more time to fundraising, not less. Defendants essentially do not dispute that lower contribution limits increase the amount of time that candidates must spend on fundraising. Instead they argue that this makes the interest in time-protection more compelling, not less, with respect to expenditure limits. In essence, plaintiffs argue that rather than address both the anti-corruption interest with contribution limits, and the anti-corruption and time-protection interests with expenditure limits, the State of Vermont must address just one interest, or else resign itself to the state of affairs post-*Buckley*. After *Buckley,* when the Court upheld the contribution limits but not spending limits, Congress' regulatory scheme fell prey to precisely this problem:

candidates have been forced to spend increasing amounts of time fundraising under a regime with contribution limits but no spending limits. We reject the notion that Vermont cannot try to address both interests—anti-corruption and time-protection—at once.

Finally, plaintiffs argue, as the *Buckley* plaintiffs did for contribution limits, that the "limitations work such an invidious discrimination between incumbents and challengers that the statutory provisions must be declared unconstitutional on their face." 424 U.S. at 30-31. We agree with plaintiffs—and with our dissenting colleague, *see post*—that election laws, written by legislators who are, at least in part, necessarily self-interested, must be scrutinized for indications that the limits unduly benefit incumbents or otherwise create dangerous distortions of the electoral system. *See Shrink,* 528 U.S. at 402 (Breyer, J., concurring) (noting the need for courts to scrutinize legislative judgments that "risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge."). It should be recognized, however, that a legislature's inaction may maintain such barriers more easily than reforms create them, and review of legislation should not amount to a presumption against the fairness of spending limits simply because elected officials have an interest in the reforms they are enacting. *See* Frank I. Michelman, *The Constitutional Question,* 24 HARV. J.L. & PUB. POL'Y 17, 22 (2000).

Indeed, there is considerable evidence in Act 64 itself that incumbent protection was not the legislature's motive. Act 64 permits challengers to outspend incumbents, partially neutralizing the advantages that incumbents often enjoy from free media exposure. Specifically, incumbent candidates for statewide office may only spend 85 percent of the amount permitted challengers. *See* Vt. Stat. Ann. tit. 17, § 2805a(c). Incumbents in the General Assembly may spend 90 percent. *See id.* These are rare types of provisions in state campaign

finance laws; if the legislature wanted to achieve incumbent protection, it seems unlikely that they would have inserted such provisions. Moreover, defendants presented evidence at trial that the disparity between challenger and incumbent spending is what most frequently disadvantages challengers, and reduces electoral competition—a disparity that spending limits would inevitably reduce. (Testimony of Donald Gross) In short, plaintiffs have not demonstrated that challengers will be disproportionately harmed by the spending limits. Like the *Buckley* court, we see no evidence in the record sufficient to overcome the presumption that "a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." 424 U.S. at 31.

In sum, because Vermont has demonstrated that the time-protection and anti-corruption interests are advanced, and plaintiffs have not succeeded in demonstrating impermissible legislative motives, we conclude that the State has met its burden on this aspect of narrow tailoring—that the spending limits actually advance these asserted interests.

2. Do spending limits at these levels allow for "effective advocacy"?

We must then turn to the question of whether the spending limits prevent "effective advocacy" by limiting the ability of candidates to communicate adequately with voters, and the ability of voters to receive the information they need to make a choice on election day. This "effective advocacy" requirement is drawn from the caselaw on whether contribution limits are sufficiently high. *See McConnell,* 540 U.S. at __, 124 S.Ct. at 655-56 ("Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to 'preven[t] candidates and political committees from amassing the resources necessary

for effective advocacy.'") (quoting *Buckley,* 424 U.S. at *21); Shrink,* 528 U.S. at 395-96 (same). Although the concept of "effective advocacy" originated with regard to the freedom of association rights rooted in the First Amendment, *see NAACP v. Alabama,* 357 U.S. 449, 459-60 (1958), the Supreme Court has also used this concept in assessing candidates' claims that campaign finance regulations place too great a burden on their First Amendment speech rights. In *Shrink,* for example, one of the plaintiffs was a candidate for statewide office who argued that Missouri's contribution limits prevented him from "amassing the resources necessary for effective advocacy." 528 U.S. at 396 (quoting *Buckley).* We believe that the use of this "effective advocacy" standard is appropriate here as a threshold consideration in assessing whether the expenditure limits are "narrowly tailored," as the parties have argued. [20]

Discussing the nature of this "effective advocacy" analysis in the context of contribution limitations, the Court asked in part whether the limitation was "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice." *Shrink,* 528 U.S. at 397; *see also McConnell,* 540 U.S. at __, 124 S.Ct. at 677. The nature of the "effective advocacy" requirement, then, is that of a constitutional minimum; as long as the regulation does not "drive the sound of a candidate's voice below the level of notice," based on evidence from past campaigns, then the First Amendment is not violated on this ground.

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[20] We note that examination of other forms of expenditure limits has often involved analysis of effective advocacy and campaigning. For example, the ability of corporations to communicate an effective political message, despite a state ban on the use of general treasury funds for candidate-oriented independent expenditures, was noted in Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990) ("We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views.") (emphasis added).

Although the District Court never reached the legal issue of narrow tailoring, it did make findings as to whether "effective campaigns" could be run under the limits. The District Court found that Vermont's expenditure limitations reflect the actual cost of running for office in Vermont, would not cause a revolutionary change in campaign spending, and would leave candidates fully capable of conducting effective campaigns. 118 F. Supp. 2d at 472. These conclusions are subject to a mixed standard of review, consistent with Rule 52(a) of the Federal Rules of Civil Procedure but also bearing in mind the obligation in First Amendment cases for appellate courts to make an independent examination of the record as a whole. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984); *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 688 (1989); *Ezekwo v. New York City Health & Hospitals Corp.*, 940 F.2d 775, 780 (2d Cir.), *cert. denied,* 502 U.S. 1013 (1991).

Based on the data presented at trial through expert witnesses, the District Court found that the average spending in Vermont House district races during the three election cycles preceding the District Court's opinion was almost uniformly below the limits set pursuant to Act 64. 118 F. Supp. 2d at 471. Similarly, multi-member Senate districts all involved average spending below that permitted pursuant to Act 64, with average spending exceeding the Act's expenditure limits only in single-member Senate districts. *Id.* In addition to reflecting the actual expenditures in Vermont elections, the District Court found that Act 64's expenditure limits are also appropriate given the costs of running for office in Vermont. The District Court credited the testimony of a number of fact witnesses who testified to the details of previous campaigns they had run, including a Senate challenger in Chittenden County and a former Senate candidate in Rutland County, "confirm[ing] that fully effective campaigns for the Vermont Senate can be run under

the limits established by Act 64." *Id.* at 472. The court noted that Vermont candidates for legislative office frequently use low-cost campaigning methods, such as community debates, door-to-door campaigning, town barbecues and suppers, advertising placards and the issuance of press releases. *Id.* Legislative candidates rarely hire campaign staff or purchase expensive mass media. *Id.* Indeed, the evidence at trial indicated that most Vermont House and Senate candidates do not use television advertising primarily because the lack of congruence between media markets and district boundaries render such advertising an inefficient and ineffective way to communicate with voters. (Ex. AA, Landell Admission #49; Ex. BB, Randall Admission #84, #85; testimony of Neil Randall; testimony of Toby Young; Ex. U-1, Expert Report of Anthony Gierzynski, at 8.) Nonetheless, candidates are able to spend the money needed to ensure that their voice is well above "the level of notice" necessary for "effective advocacy." *Shrink,* 528 U.S. at 397.

Although candidates for statewide office utilize more expensive media and techniques, they are permitted to spend larger amounts and can thus also engage in "effective advocacy." In part, this reflects the particular qualities of Vermont, especially the relatively inexpensive cost of television advertising in the State. 118 F. Supp. 2d at 472. In reaching this conclusion, the District Court rejected testimony of plaintiffs' witnesses that much larger amounts of money—amounts so large that no Vermont candidate has ever spent them—are required to wage an effective campaign for governor or other statewide offices. *See id.* ("The Court rejects [the witness's] testimony that it is necessary to spend between $800,000 and $1 million to run an effective campaign for Governor of Vermont . . . Nor does the Court accept that candidates must spend approximately $500,000 in order to run effective campaigns for Lieutenant Governor and the other lower statewide offices of Secretary of State, Treasurer, Auditor, and Attorney General.").

And though conflicting evidence was presented at trial, there was ample evidence aside from the specific statistics and campaigns cited in the District Court opinion to support the District Court's effective campaign findings. For example, plaintiffs' evidence emphasized what they described as the problems under the limits for candidates running for Senate in Chittenden County, a county that includes the city of Burlington, as well as very rural areas. But defendants presented evidence that the average spending in this district was consistently far less than the $16,500 allowed under Act 64. More specifically, defendants presented evidence that in 1994, all six of the victorious candidates in Chittenden County spent at or near the Act 64 spending limits, including two successful challengers. In 1996, all six winners spent at or below the limits, including three successful challengers. And in 1998, three of the six candidates spent below the limits. As to statewide races, one candidate for State Auditor in 2000, Elizabeth Ready, indicated that under the $45,000 limit for her race, she had been able to purchase newspaper and radio ads, and considered using television advertising later in the race.

Plaintiffs may not simply rely on the highest-spending races in order to declare the entire statute unconstitutional on its face. In *Shrink,* the Supreme Court went as far as to assume the truth of plaintiff's claim that the contribution limits affected his ability "to wage a competitive campaign," and concluded that nonetheless, "a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley."* 528 U.S. at 396. Indeed, certain plaintiffs have a particularly difficult time arguing that the spending limits will burden their First Amendment rights. Plaintiff Donald Brunelle's maximum expenditure in any of his past House campaigns was $1,007, and plaintiff George Kuusela has never spent more than $1,550. The new limits allow each of them, as challengers, to spend $3,000 in

their House campaigns, significantly more than they have spent in the past.

In *Shrink,* the Supreme Court relied on and quoted the District Court's conclusions, made on cross-motions for summary judgment, that "candidates for state elected office [have been] quite able to raise funds sufficient to run effective campaigns," and that "candidates for political office in the State are still able to amass impressive campaign war chests." 528 U.S. at 396 (citations omitted). Like the *Shrink* Court, we affirm the District Court's conclusion, here made after a 10-day bench trial, that candidates can meet the threshold level of "effective advocacy" when running for office in the State of Vermont. 118 F. Supp. 2d at 471-72. After independent review, we agree with the District Court that these expenditure limits are not "so radical in effect" as to "drive the sound of a candidate's voice below the level of notice," *Shrink,* 528 U.S. at 397, and therefore the limits do not prevent candidates from "amassing the resources necessary for effective advocacy." *Buckley,* 424 U.S. at 21. However, as we address in the next section, the inquiry into how much the spending limits impinge First Amendment rights is broader than it was in the *Shrink* contribution limits context, and therefore must go beyond merely "effective advocacy."

3. Are mandatory expenditure limits the least restrictive means of advancing the State's interests?

The greater level of scrutiny accorded spending limits, as compared to contribution limits, requires that Vermont must also prove that Act 64's mandatory expenditure limit system is the least restrictive alternative for achieving the State's compelling time-protection and anti-corruption interests. This inquiry is essentially twofold. First, the State must prove that the *typ e* of regulation chosen was the least restrictive—that is, that no other type of regulation could

have advanced the interests asserted while impinging less on First Amendment rights. Second, the least restrictive alternative inquiry requires scrutiny of the basis for the particular spending limits chosen—an inquiry not undertaken with respect to contribution limits. In evaluating the constitutionality of contribution limits, the Supreme Court has indicated that "[i]f it is satisfied that some limit . . . is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000," noting that "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Buckley*, 424 U.S. at 30. In the context of expenditure limits, and in light of the legislative history of Act 64, there may well be "differences in kind" as to the choice of specific spending limits that demand scrutiny.

a. *Type of Regulation*

Vermont argues that it "had already explored less restrictive alternatives and found them to be ineffective." Specifically, in 1993, the State instituted a system of voluntary expenditure limits. Former Vt. Stat. Ann. tit. 17, §§ 2841-42 (1991) (repealed 1997). Under this system, candidates had the option of signing an affidavit indicating that they would comply with the spending limits and, in exchange, received any favorable or unfavorable publicity from that decision. At trial, Vermont presented evidence that the voluntary spending limits in place from 1993 to 1997 were not working. Participation in the voluntary system fell dramatically each year, with 90 percent of candidates participating in the first year but less than 20 percent in the second year. Witnesses testified that Vermont's voluntary limits did not work because candidates attempted to gain an advantage in the fundraising "arms race" by ignoring the limits. Most tellingly, by 1998, not a single candidate for statewide office chose to abide by the voluntary expenditure limits.

Vermont's voluntary limits were quite different, however, than many of the voluntary spending limits in other states.[21] In Vermont, the only "carrot" exchanged for the voluntary agreement to the limits was the ability to publicize one's compliance. Most other states (and New York City) offer additional incentives such as public matching funds, a higher contribution limit, or other inducements. *See, e.g.*, WRITING REFORM: A GUIDE TO DRAFTING STATE AND LOCAL CAMPAIGN FINANCE LAWS, V-8-19 (Deborah Goldberg ed., Brennan Center 2001) (describing variety of mechanisms used by states to encourage compliance with voluntary limits). And many of these types of provisions have been upheld by the federal courts of appeals in the face of a First Amendment challenge. *See e.g. Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552-53 (8th Cir. 1996) (upholding Minnesota's voluntary public financing scheme), *cert. denied*, 520 U.S. 1229 (1997); *see also Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (holding that Rhode Island's voluntary public financing statute survives exacting scrutiny).

Indeed, this type of spending limit—voluntary, but with public funding as an inducement to comply—was in Act 64 as originally introduced in the House, but the provision appears to have been changed to mandatory in one of the House committees. (Ex. A, at E-0001, 0031.) It is unclear from the current record why this change occurred,

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[21] Voluntary campaign expenditure limitations of one sort or another have been promulgated by governments in Hawaii, Kentucky, Maine, Maryland, Michigan, Minnesota, New Hampshire, Rhode Island, and Wisconsin. *See, e.g.*, Haw. Rev. Stat. § 11-219 (2003); Ky. Rev. Stat. Ann. § 121A.030 (2003); Me. Rev. Stat. Ann. tit. 21-A § 1125 (2003); Md. Code Ann. Elec. Law § 15-105 (2003); Mich. Comp. Laws Ann. § 169.267 (2003); Minn. Stat. § 10A.25 (2003); N.H. Rev. Stat. Ann. § 664:5-b (2003); R.I. Gen. Laws § 17-25-20 (2003); Wis. Stat. Ann. § 11.31 (West 2003) (enforcement enjoined by *Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078 (W.D. Wis. 2002).

and the District Court made no findings on this point. Similarly, it is possible that the Vermont legislature could have employed a public financing option for all offices, in addition to the option that was provided for Governor and Lieutenant Governor candidates. *See, e.g.,* General Accounting Office, *Campaign Finance Reform: Early Experiences of Two States That Offer Full Public Funding for Political Candidates,* (May 9, 2003) (GAO-03-453) (assessing initial results of public funding of legislative candidates in Maine and Arizona). Notably, early versions of the bill appear to have contained such funding for a broader range of offices. (testimony of Karen Kitzmiller; Ex. 70, at E-2828.) On the other hand, after the voluntary affidavit system broke down, the legislature may have concluded that only mandatory expenditure limitations, together with contribution limitations, would adequately advance the State's interests. Indeed, there may have been still other reasons—not yet made part of the record—for the legislature's decision not to adopt, for all offices, voluntary expenditure limits with public funding incentives.

If Vermont could have utilized some of the same voluntary mechanisms employed by other states, offering either financial or other incentives for compliance with expenditure limits, then Vermont may not be able to prove that it employed the least restrictive alternative. *Cf. Denver Area Educational Telecommunications Consortium v. FCC,* 518 U.S. 727, 758 (1996) ("[W]e can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as *some indication* that more restrictive means are not 'essential' (or will not prove very helpful).") (emphasis in original). On remand, the District Court should make findings as to whether there were less restrictive alternatives available that could have been as effective in advancing the asserted interests. *See Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986) (alternatives should serve the interest "'about as well'").

Should there be proven another type of regulation that would have similarly advanced the interests asserted, while impinging less on First Amendment rights, the District Court will have a basis to find that the provision is not narrowly tailored.

b. *Basis for Spending Cap Limits*

If the District Court finds, however, that mandatory spending limits were the only type of regulation that could sufficiently advance Vermont's time-protection and anti-corruption interests, then the court must also inquire into the basis for the particular amount of the spending limits chosen. There was evidence presented at trial that Act 64's spending limits were intended to map onto existing spending levels from past campaigns. In defendants' proposed findings of fact after trial, defendants indicated that the legislature "considered factors such as population, historical information on past spending levels and campaigns, Vermont's previous voluntary spending limits, and the testimony of numerous witnesses concerning the appropriate level for the limits, with the legislature balancing different viewpoints as is necessary with most pieces of legislation." This is consistent with the District Court's findings that the average spending on past races was consistently under the limits imposed by Act 64. 118 F. Supp. 2d at 471-472. *See also* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?,* 85 MINN. L. REV. 1729, 1769 (2001) (suggesting that median spending levels of candidates in recent races could be an appropriate basis for spending limits).

Nonetheless, the specific basis for the final limits is not entirely clear from the existing record. Defendants noted that for the Governor's race, the Senate bill would have set a $250,000 limit, while the House bill originally set a $400,000 limit. In the final bill as adopted, the limit was set at $300,000. Similarly, the limits for one-seat Senate races

varied in the various committee bills, either $4,000, $5,000 or $6,000, with an additional $2-3,000 for each additional seat in the district. The final limits were those that emerged out of the Senate Finance Committee (the lowest in any of the committee bills)—$4,000 plus an additional $2,500 for each additional seat. Such decisions, of course, could be the product of typical legislative compromise—a process into which we will not intrude. However, plaintiffs also presented evidence that the ultimate decision as to the amount of certain statewide spending limits was motivated by a desire to preserve the public fisc, because of Act 64's public financing option for gubernatorial and Lieutenant Governor candidates.[22] Particularly in the context of expenditure limits, these choices demand greater scrutiny.

Thus, in undertaking its "least restrictive means" analysis on remand, the District Court should make additional findings on the impact of the legislative choices as to the appropriate spending limits on candidates' and voters' First Amendment rights. Even if Act 64's spending limits are sufficiently high to permit "effective advocacy" as defined in *Shrink,* as the District Court found and as we have affirmed, the precise level of the limits chosen can have a significant impact on how "restrictive" the provision is on First Amendment rights. Of course, a $2 million limit for State Senate races is quite unlikely to restrict First Amendment rights, but equally unlikely to impact the "arms race" mentality and thereby advance the interests asserted. Moreover, there will always be "distinctions in degree" that could be seen as less restrictive—$305,000 is "less restrictive" than $300,000; $310,000 "less restrictive" than $305,000, etc. And such an inquiry has no logical endpoint.

[22] We draw no conclusions at this stage about whether such a reason would be constitutionally acceptable.

However, the specific choices made by the Vermont legislature among the different spending limits contained in various bills may be "differences in kind" with respect to the impact on the First Amendment rights of candidates and voters. Inquiries into the First Amendment impact of challenged regulations have been undertaken in analogous contexts by other courts, *see, e.g., National Black Police Ass'n v. D.C. Board of Elections and Ethics,* 924 F. Supp. 270, 277 (D.D.C. 1996) (considering a variety of factors in assessing whether the reduction in campaign funds was "so substantial that it affected the candidates' ability to reach voters"), vacated as moot *sub nom. National Black Police Ass'n v. District of Columbia,* 108 F.3d 346 (D.C. Cir. 1997), and, although necessarily speculative here, should be undertaken on remand. If the choice of the lower spending limit—for example, $4,000 for a Senate race as opposed to $6,000—is significantly "more restrictive," while no more effective in advancing the interest asserted, then the lower spending limit is not consistent with the First Amendment. Assessing the legislative alternatives, then, requires evaluating both (1) the extent to which the higher spending limit is "less restrictive" of the First Amendment rights of candidates and voters[23]; and (2) the extent to which the higher spending limit would be as effective in advancing the anti-corruption and time-protection interests. The answers to these questions will determine whether the spending limits

[23] In addition, our dissenting colleague asserts that Act 64's definition of "expenditures" and "related expenditures" may mean that the spending totals for past campaigns understate the amount of expenditures as defined by Act 64. He also points out that the legal and record keeping costs of compliance with the new law will also inflate future candidates' expenditures. See post at [56-58]. Findings in this regard will also help inform the inquiry on the degree to which this provision impinges on First Amendment rights.

chosen not only allow for "effective campaigns" but also are the "least restrictive alternative," and therefore narrowly tailored.

E. Conclusion: Remand for Further Findings

Quite simply, the District Court found that effective campaigns can be waged under Act 64's stated limits, and we agree. But the District Court did not examine, because it found spending limits *per se* unconstitutional, whether the legislature might have chosen either another type of regulation besides mandatory spending limits, or higher limits, that would still achieve the goals we sanction and yet impinge less on the First Amendment rights of candidates and voters.[24] *Cf. Turner Broadcasting System, Inc. v. FCC,*

[24] The dissent asserts that this least restrictive means inquiry is a "mixed issue of legislative fact and law" that does not require remand. See post at [132]. The dissent's extensive discussion of the significance of the distinction between adjudicative and legislative facts seems to us tangential and unhelpful. The fact that this Court may ultimately undertake de novo review of any legislative facts found by the District Court on remand or that appellate courts take judicial notice of legislative facts under appropriate circumstances, see *id.*, does not mean that we must resolve disputed legislative facts—particularly facts that are dispositive of the case before us—on an insufficiently developed record. Nor should we, under these circumstances, take judicial notice of facts relating to Vermont's political and electoral system, an arena in which this Court lacks substantial experience or expertise. By contrast, the types of "legislative facts" that have been addressed most recently in our caselaw deal with much more straightforward questions, e.g., geography and jurisdiction or the fact that cocaine is derived from coca leaves. See, e.g., United States v. Hernandez-Fundora, 58 F.3d 802, 812 (2d Cir.) (citations omitted), cert. denied, 515 U.S. 1127 (1995).

Judge Winter's fundamental disagreement with our opinion seems not to be one of appropriate characterization of facts. Rather, his dispute with our position is that he believes that a remand is unnecessary because there is nothing more to be learned. Obviously we disagree. There are gaps in the record—likely the result of the District Court's abridged consideration of the issue of narrow tailoring—that ought be filled before any court undertakes to resolve the ultimate issue in this case: whether

512 U.S. 622, 668 (1994) (remanding, after grant of summary judgment, "to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions" in part because "the record fails to provide any judicial findings concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests") (quoting *Sable Communications of Cal., Inc., v. FCC,* 492 U.S. 115, 129 (1989)). As to the amount of the limits, there obviously comes a point where limits would be set so high as to have no impact on the interests sought to be protected. We need, however, to hear from the District Court on this fact-intensive question of whether that point is as set in Act 64 or appreciably higher.

On remand, the District Court ought consider, along with any other issues relating to narrow tailoring that it and the parties deem relevant: (1) what alternatives were considered by the legislature, including both alternative *types* of regulations and alternative *amounts* for the limits; (2) why these alternatives were rejected; (3) whether and how these alternatives would impinge less on First Amendment rights; and (4) whether the alternatives would be as effective as the mandatory spending limits in advancing the time-protection and anti-corruption interests.[25] Based on its fact-finding on

there are less restrictive alternatives that could have advanced Vermont's compelling interests.

[25] Our dissenting colleague criticizes these guidelines for further inquiry on several grounds, none of which we find persuasive. At the outset, he asserts that the first two queries are simply straightforward questions of legislative history. See post at [134-35]. Unfortunately, as noted supra at [67-70], the answers to these questions are not discernible from the existing record. To the extent that the dissent is suggesting that these questions are irrelevant, see post at [139-40], we disagree.

these issues, the District Court will be able to draw a legal conclusion as to whether Vermont's legislature chose the "least restrictive alternative" for advancing its interests, and therefore whether the expenditure limits are narrowly

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We reject the suggestion that we are overly focused on what the legislature *did*. Of course, the ultimate issue for the District Court on remand is whether there exists a less restrictive type or degree of regulation that would serve Vermont's compelling anti-corruption and time-protection interests; it is not merely whether the legislature considered such an alternative. See supra at [67-73]. Because our dissenting colleague concludes, without citation, that "a combination of public and private financing with low contribution limits is infinitely less restrictive . . . and accomplishes all of the ostensible purposes of Act 64's expenditure limits," he deems a remand unnecessary. See post at [140]. We, however, do not believe that proposition to be self-evident, nor is it supported by the current record.

We are loath to presume, on an incomplete record, the reasons for the legislature's decision not to pursue such alternatives and we believe the District Court's—and perhaps eventually this Court's—evaluation of whether less restrictive alternatives exist will undoubtedly be aided by the legislature's own analysis of those alternatives, to the extent such analysis occurred. Indeed, even a modicum of deference to the legislature and consideration for principles of federalism would seem to require consideration of its reasons for rejecting a potentially-less-restrictive alternative scheme. But see post at [141] (concluding that the only possible reason for rejecting such a measure is the drafters' ulterior, incumbent-protective motive).

So as not to restrict its proceedings upon remand in any way—and to avoid the strictures of the mandate rule, see, e.g., United States v. Ben Zvi, 242 F.3d 89, 95 (2d Cir. 2001) (explaining that the mandate rule "compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court") (citation, emphasis and internal quotation marks omitted)—we have elected to speak broadly in framing the inquiry to be undertaken on remand. To do as our dissenting colleague suggests, on the limited record before us, would unnecessarily and unwisely encroach on the essential role of the district judge in these proceedings.

tailored.[26]

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[26] Before leaving the issue of the constitutionality of the spending limits, we briefly address a concern raised by our dissenting colleague: that there is language in Act 64 relating to the expenditure limits that renders the provision impermissibly vague. See post at [29-45]. As a threshold matter, it must be pointed out that plaintiffs did not raise this claim either in the District Court or on appeal—and it is not because they were unfamiliar with such a claim. Indeed, plaintiffs made this kind of argument with regard to other provisions in Act 64 also at issue in this case, see infra at 87; and one plaintiff, represented by the same counsel as here, challenged other provisions of Act 64 in a previous case on these grounds. See Vermont Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 387 (2d Cir. 2000) ("VRLC identifies an additional constitutional problem posed by [the disclosure provisions]: They are impermissibly vague."). We will not strike down a state statute, in a pre-enforcement facial challenge, on grounds upon which it has not been challenged.

The dissent takes issue specifically with several aspects of the statutory language that pertain to the expenditure limits—that the spending is made "for the purpose of influencing an election," that it applies to "anything of value," and the spending is attributable to a "candidate." See post at [29-38]. Of these, the first two provisions have been a part of federal and state campaign finance laws for decades, and they have been upheld by the Supreme Court. See *Buckley*, 424 U.S. at 145-47; 2 U.S.C. § 431(8)(A)(i). As to the last provision regarding "spending attributable to a candidate," the notion that candidates do not know when they are candidates is belied by the specificity of the provision itself. As the dissent appears to acknowledge, Act 64 defines "candidate" as someone who has done one of three specific things. See post at [37]. Though the dissent raises the possibility that a candidate could be deemed a candidate by some other "affirmative action" not defined by statute, see *id.*, no plaintiff has raised this concern in light of the statute's clarity in this regard.

Finally, we note that, of course, as with all campaign finance regulations, minor ambiguities, omissions or statutory quirks will be resolved in the normal course of administrative interpretation, legislative amendment and litigation. In any event, the ambiguities raised by the dissent do not, we believe, render the statute unconstitutional. Indeed, though raising the specter of a multitude of pitfalls latent in the statutory text, even our dissenting colleague would uphold the constitutionality of the majority of the Act—despite that many of those same ambiguities speak to portions

With respect to treating related expenditures as candidate expenditures, *see* § 2809(b), the District Court did not analyze this question after deciding that candidate expenditure limits were unconstitutional *per se*. On remand, independent of the constitutionality of expenditure limits, the District Court should evaluate this issue.

Because a content-based regulation of speech such as this is presumptively invalid, and the District Court held it unconstitutional, we leave in place the injunction against enforcement of these provisions pending further proceedings consistent with this opinion.[27]

II. Act 64's Contribution Limitations

Act 64 also imposes four basic types of contribution limitations. First, contributions by individuals to candidates are limited to $200 for state representative and other local offices, $300 for state senator and other county offices, and $400 for statewide office. *See* Vt. Stat. Ann. tit. 17, § 2805(a). Second, PACs and political parties may not accept contributions from a single source in excess of $2000 and are subject to the individual contribution limits when contributing to candidates. *See id.* Third, individuals, PACs or political parties that make "related expenditures" with candidates must count those expenditures toward the relevant expenditure and contribution limits. *See id.* at § 2809(a)-(c). Finally, candidates, PACs, and political parties may not accept more than 25 percent of their total resources from out-of-state sources. *See id.* at § 2805(c).

A. Limitations on Contributions by Individuals to Candidates

The contribution limits of $200 (state

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of the Act unanimously upheld in Part II of this opinion.

[27] Any amendment by the Vermont legislature to mandatory spending caps in the interim has the potential, of course, to moot litigation over its constitutionality.

representative), $300 (state senator), and $400 (statewide office) are subject to a lesser degree of scrutiny than expenditure limits, as explained most recently by the Supreme Court in *Shrink*. 528 U.S. at 386. Contribution limits can survive "if the Government demonstrated that contribution regulation was closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tuned." *Id.* at 387-88 (internal quotation marks omitted).

The governmental interest in eliminating actual and apparent corruption is sufficient to support Vermont's limits on contributions to candidates. The *Buckley* Court upheld limitations of $1000 on contributions to candidates for federal office on the strength of this interest alone. "It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification . . . ." 424 U.S. at *26; see also McConnell,* 540 U.S. at __, 124 S.Ct. at 647 (explaining that in *Buckley,* the Court "determined that limiting contributions served an interest in protecting 'the integrity of our system of representative democracy'") (quoting *Buckley,* 424 U.S. at 26-27); *Jacobus v. Alaska,* 338 F.3d 1095, 1107 (9th Cir. 2003) ("[A] failure to regulate the arena of campaign finance allows the influence of wealthy individuals and corporations to drown out the voices of individual citizens, producing a political system unresponsive to the needs and desires of the public, and causing the public to become disillusioned with and mistrustful of the political system."). In this case, the District Court relied on trial testimony, citizen polls, comments by public officials and media coverage to demonstrate the real and perceived threat of corruption in Vermont. 118 F. Supp. 2d at 469, 478. As the District Court concluded, "[t]he threat of corruption in Vermont is far from illusory." *Id.* at 478.

In addition, we conclude that the Vermont limits are "closely drawn" to this anti-corruption interest. The District Court's findings in this respect are reasonable and based on the evidence adduced at trial. *Id.* at 470, 478-80. The District Court relied in part on expert testimony indicating that over the last three election cycles, less than 10 percent of contributions exceeded the limits set by the Vermont legislature. *Id.* at 478. Based on testimony by both plaintiffs and defendants' witnesses, the District Court also concluded that the limitations approximated amounts "considered suspiciously large by the Vermont public." *Id.* at 479-80. And finally, the court compared the Vermont law to similar limits upheld in Maine and Missouri. In Maine, a limit of $250 for House and Senate candidates was upheld. *See Daggett v. Comm'n on Governmental Ethics & Election Practices,* 205 F.3d 445, 459 (1st Cir. 2000). In Missouri, limits of $1075, $525, and $275, depending on the size of the electoral district have been upheld. *See Shrink,* 528 U.S. at 396-98, *remanded to Shrink Mo. Gov't PAC v. Adams,* 204 F.3d 838, 840-42 (8th Cir. 2000).[28]

The contribution ceilings are also sufficiently high to permit effective campaigning. Overly restrictive contribution limits might "have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley,* 424 U.S. at 21. Contribution limits, however, need not be perfectly set: the failure of the legislators to "engage in such fine tuning does not invalidate the legislation." *Id.* at 30. As we have indicated, "distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* We agree

[28] The District Court noted that by way of comparison, the Vermont law has a limit-constituency ratio (i.e., the maximum contribution allowed divided by the number of constituents) of .00068, compared to .00040 under the Missouri statute. 118 F. Supp. 2d at 479.

with the District Court's conclusion that the contribution limits imposed by Act 64 do not "amount to differences in kind."

As the District Court found, the limits imposed by Vermont hardly overwhelm the ability of candidates to engage in active and effective campaigning. The District Court marshaled evidence to support its findings, and conducted a fact-intensive analysis of what constitutes effective campaigning. 118 F. Supp. 2d at 478-79. Moreover, Vermont has actually conducted an election since the imposition of these contribution limits (for Mayor of Burlington), and that election involved effective campaigns despite the contribution limitations. *Id.* at 471, 479. Subject to the applicable limits imposed by the statute, the mayoral candidates raised funds comparable to the amounts spent in State Senate races in the past. *Id.* The District Court further concluded that the limits may actually improve the ability of candidates to campaign, by freeing candidates from the time-consuming task of "wooing big donors." *Id.* at 480.

B. Limitations on Contributions to and by PACs and Political Parties

Act 64 also regulates the ability of PACs and political parties to give and receive contributions. The Act prohibits such organizations from accepting contributions of more than $2000 from a single source during any two-year general election cycle. *See* Vt. Stat. Ann. tit 17, § 2805(a). The Act further prohibits those organizations from making contributions to political candidates in excess of the general contribution limits—$200 for state representatives or local office, $300 for state senator or county office, and $400 for statewide office. *See id.* at §§ 2805(a)-(b).

The District Court upheld these limitations, except as applied to contributions by political parties to their own candidates. 118 F. Supp. 2d at 486-87. Upon review, we hold that all of these limitations are constitutional. We thus affirm

the judgment of the District Court as to the constitutionality of most of the limitations, but reject the District Court's conclusion that political parties cannot be prohibited from contributing to candidates in excess of generally applicable limitations. We discuss three narrow issues that require further attention and, as to two of those issues, further proceedings before the District Court.

We first consider the issue of the $2000 limitation on contributions to political committees or political action committees and political parties. Act 64 defines "political committees" or "political action committees" as "any formal or informal committee of two or more individuals, not including a political party, which receives contributions or makes expenditures of more than $500.00 in any one calendar year for the purpose of supporting or opposing one or more candidates, influencing an election or advocating a position on a public question, in any election or affecting the outcome of an election." Vt. Stat. Ann. tit 17, §2801(4). A political party is defined as including both the central party apparatus and "any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party." *Id.* at § 2801(5).

Perhaps the most typical application of these rules would involve contributions to a political committee or political party that participates in the political process either by making contributions to or coordinated expenditures with candidates for office. As applied to these organizations, the $2000 limitation is unquestionably constitutional. Political action committees "derive rights from their members" and are accordingly due First Amendment protection. *Colorado Republican II,* 533 U.S. 431, 448 n.10. It is well established, however, that the state interest in fighting corruption, real and apparent, justifies limitations on contributions by individuals to particular candidate committees. Such a state interest is equally capable of justifying limits on

contributions made to political parties or committees.

> If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee . . . which advocates the views and candidacies of a number of candidates.

Cal. Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 197 (1981) (*"CMA"*).

The plaintiffs do not dispute that, in principle, such limitations may be constitutional. Instead, they argue that Vermont's chosen limitations are overbroad, both because the statute applies to too many organizations and because it sets the contribution ceiling too low.

Regarding the first point, the plaintiffs assert that the restriction is an "overbroad, blunderbuss approach that punishes" even those organizations that are unlikely to corrupt the political process. They imply that certain types of PACs, "particularly legislative leadership PACs or ideological PACs," pose a weaker danger of corruption and should therefore be permitted greater latitude in determining how to allocate their contributions. The plaintiffs argue that the limits are unconstitutional because Vermont has not shown any independent evidence that political parties and PACs have a negative or deleterious effect on Vermont's politics. Further, the plaintiffs contend, these organizations are even less likely to corrupt in light of Act 64's other limitations on campaign financing. Private individuals cannot, for example, effectively funnel large gifts through political parties because parties can themselves only make contributions to candidates of between $200 and $400.

An argument identical to the plaintiffs' overbreadth

argument was addressed and rejected in *Buckley*. There, the appellants argued that many large contributors have no interest in corrupting the political process, and the law was overbroad for restricting the rights of these unthreatening contributors. The Supreme Court upheld the constitutional validity of generally applicable contribution limits of $1000, even though "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." *Buckley*, 424 U.S. at 29. The Court reasoned that the very corruption rationale which provides a foundation for the constitutional validity of contribution limitations supports their general applicability: "Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.

These arguments were also rejected by the Supreme Court in *CMA*. 453 U.S. at 197. In that case, a California political action committee challenged a $5000 federal limit on annual contributions by individuals and associations to multicandidate political committees. *See id.* at 186. Like the plaintiffs here, the parties in *CMA* asserted that such limitations do not serve the government's strong interest in preventing actual or apparent corruption in the political process. *See id* at 197. The Supreme Court concluded that *"Buckley* precludes any argument" that the government may not limit the size of contributions made to multicandidate committees, and rejected the assertion that such limitations do not further the government's interest in battling political corruption. *Id.* Without such limitations, individuals could evade the contribution limitation "by channeling funds through a multicandidate political committee." *Id.* at 198.

In light of these prior holdings, we are unpersuaded by the plaintiffs' contention that Vermont had an obligation to divine which PACs and political parties pose the most

serious risk of corruption, and develop a record that donations to each type of organization, narrowly defined, pose a strong threat of corruption. It is clear that, in principle, such limitations are an "appropriate means . . . to protect the integrity of the contribution restrictions upheld . . . in *Buckley*." *CMA*, 453 U.S. at 199. Thus, the Vermont provision is constitutional so long as the danger of corruption of the political system exists. Just as individuals may be limited from directly contributing to campaign organizations, individuals may be limited from doing so indirectly—that is, contributing large sums to PACs or political parties that funnel money to candidates. *See Buckley*, 424 U.S. at 38; *cf. Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003) (explaining that "restricting contributions by various organizations hedges against their use as conduits for 'circumvention of [valid] contribution limits'") (citation omitted; alteration in original). Vermont does not have the burden to show on a contributor-by-contributor basis that contributions have led to corruption.

The plaintiffs' second argument is that the $200, $300, and $400 limits on contributions to candidates for office are unnecessarily low, and that political parties and PACs should be exempt. The plaintiffs in *Buckley* also raised this argument, contending that the $1000 limitation regulated more contributions than necessary to accomplish its anti-corruption goals. Specifically, the appellants argued that even contributions of a larger amount did not carry a risk of corruption because no politician would throw away a career and reputation for a $1000 donation. As with the earlier overbreadth argument, the Supreme Court also has rejected this contention. *See Buckley*, 424 U.S. at 30. "[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* (quotations and citations omitted). The Court reaffirmed the validity of this approach in *Shrink*, stating that a contribution limit survives

scrutiny only if the regulation is "closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tun[ed]." 528 U.S. at 387-88 (citations and internal quotation marks omitted; alteration in original); *see also Montana Right to Life Assoc. v. Eddleman,* 343 F.3d 1085, 1095 (9th Cir. 2003) (same).

In order to succeed, then, plaintiffs must establish that when the limitations are applied to political parties and political action committees, they impose such a severe burden that it results in a "difference[] in kind" from alternative limits. *Buckley,* 424 U.S. at 30. In other words, a party seeking a special exemption from such laws carries a large burden. Illustrative of the political parties' and political action committees' burden in this regard is *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986) *(MCFL).* In that case, the Supreme Court considered the constitutionality of a federal law which bans corporations from making any political expenditures from general corporate funds. The statute's purpose was to regulate "the corrosive influence of concentrated corporate wealth." *Id.* at 257. The Federal Election Commission had sought enforcement of the provision against an incorporated, non-profit pro-life advocacy organization that had "features more akin to voluntary political associations than business firms." *Id.* at 263. The Court held that, as applied, the provision was unconstitutional because the stated interest does not apply to an incorporated association like MCFL. *Id.* at 263-64. The Court set forth specific and demanding criteria for determining when other corporations fall into this constitutionally mandated exclusion, which the advocacy organization was able to meet. *Id.*

We should expect that the plaintiffs here bear a similar burden of establishing their exceptionalism, even if the particular facts of *MCFL* do not apply. Unlike the situation in *MCFL,* the PACs here have offered no evidence that PACs and political parties have overriding features

exempting them from the general findings about actual and apparent corruption in Vermont. Nor have they provided evidence that the limitations, when applied to these organizations, impose such a severe burden on speech as to constitute a difference in kind. As mentioned, the District Court concluded, after considering a large body of evidence, that the contribution limits are high enough so that they do not constitute a severe infringement—a difference in kind—of the ability to associate politically. 118 F. Supp. 2d at 476-81. We thus agree with the judgment of the District Court and find that Act 64's contributions limits on political action committees and parties are constitutional.

The District Court did find support for one exception to the candidate contribution limits: those made by political parties. In this regard, we reject the District Court's conclusion that on account of their "unique role in the mechanics of our democracy," political parties must have greater freedom to provide their candidates with financial support. *Id.* at 486. Relying on the central place of political parties in elections, the District Court held that the generally applicable limits were too severe when applied to parties. This was despite the fact that the District Court had already concluded that candidates can receive sufficient funds to effectively exercise their First Amendment rights even when restricted by Act 64's contribution limits. Nevertheless the District Court held that "[s]uch limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper." *Id.* at 487.

We see no other way to understand the District Court's position than as being founded on the belief that political parties operate as specially protected institutions under our Constitution and thus merit special treatment. Whatever the validity of this principle in other legal contexts, the Supreme Court has recently left no doubt that parties do not deserve a special exemption from generally applicable contribution limits. *See Colorado Republican II,*

533 U.S. at 480-82. In that case, the Colorado Republican Party challenged the constitutionality of restrictions on expenditures it made in coordination with candidates for office, arguing that "coordinated spending is essential to parties because a party and its candidate are joined at the hip, owing to the very conception of the party as an organization formed to elect candidates." *Id.* at 477 (citations and quotation marks omitted). The Court held that such limitations are a constitutional mechanism for ensuring that contributors do not circumvent the federal contribution limit and rejected the claim that political parties occupy some special place in our constitutional system. Above all, the argument fails because, just as with other political organizations, political parties "are necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors." *Id.* at 479. Thus, as it does with any other contributor to political campaigns, the government has an interest in restricting the flow of money from parties to candidates in order to reduce actual and apparent corruption. "The Party's arguments for being treated differently from other political actors subject to limitation on political spending under the Act do not pan out." *Id.* at 481. Since we agree with the District Court's conclusion that Vermont's limits are "vital to deter avoidance of the individual contribution limits," 118 F. Supp. 2d at 487, we hold that their application to political parties is supported by this strong governmental interest.

Having concluded that the restriction of contributions from political parties is supported by a constitutionally sufficient governmental interest, we turn to the question of whether the statute is sufficiently tailored to this interest. As discussed above, the District Court reviewed the limits based

upon data reflecting the costs of elections and the views of citizens regarding what constitutes suspiciously large gifts. Based on this body of evidence, the District Court concluded that gifts in excess of the limits create the appearance of, and increase the likelihood of, corruption. Moreover, contributions in the amounts permitted by the Act provide citizens an adequate tool for "speaking their mind" by giving a donation in order to affiliate with a candidate. *Id.* at 478-80.

However, there are three narrower issues that require more individual attention. The first concerns the Act's definition of local and state party affiliates as a single entity. For the purposes of determining whether a political party has exceeded its various contribution limitations, Act 64 defines a political party as "any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party." Vt. Stat. Ann. tit. 17, § 2801(5). Vermont's Secretary of State has interpreted this provision, in conjunction with Vt. Stat. Ann. tit. 17, §§ 2301-2320, to require that state and local branches of political parties be considered a single unit for the purposes of applying contribution limits, and determining whether those limits have been reached or violated.

Plaintiff Vermont Republican State Committee argues that this definition requires the party to treat itself as a single monolithic unit, and requires the party to abandon its current, decentralized structure. However, the plaintiff has not cited any actual changes that will need to be made, except that local and state affiliates will now have to record and coordinate their contributions. In other words, the provision does not impose any organizational burden on the party outside of the campaign finance realm, and requires no broader organizational reform. Moreover, the District Court indicated doubt as to whether the Republican Party actually demonstrated that it operates in the decentralized form that it

claims. For example, the state committee brought suit on behalf of all of the town and county committees without ever consulting them or asking them to approve the lawsuit. 118 F. Supp. 2d at 487-88. The District Court also noted that federal election law treats state, county, and town committees as a single unit for the purposes of campaign finance. *Id.* We agree with the District Court that, insofar as Vermont's campaign finance law treats state and local affiliates as a single entity, it suffers from no constitutional defect.

Second, the plaintiffs have argued that Act 64 applies to even those political action committees that make wholly independent expenditures. Plaintiff Vermont Right to Life Committee-Fund for Independent Political Expenditures ("VRLC-FIPE"), which is affiliated with the Vermont Right to Life Committee ("VRLC"), is a political committee that, by its charter, cannot make contributions to candidates. It has asserted that it makes only independent expenditures, that is, it never coordinates its expenditures with candidates for office. Thus it argues that when applied to itself, the $2000 cap operates as a limitation on independent expenditures.

The statute does appear to lend itself to such an interpretation. On the one hand, the Act explicitly states that it does not apply to independent expenditures. The law explicitly states that "[t]he limitations on contributions . . . shall not apply to contributions made for the purpose of advocating a position on a public question, including a constitutional amendment." Vt. Stat. Ann. tit. 17, § 2805(g). Nonetheless, it appears that VRLC may be correct that even political organizations that make solely independent expenditures, but nonetheless advocate the election of particular candidates, would be covered. *See id.* at § 2801(4).

Thus, we remand for findings on the following points: (1) whether plaintiff VRLC makes solely independent expenditures and thus has standing to challenge this

provision; (2) whether the Vermont law actually restricts independent expenditures by such organizations; and (3) whether Vermont has a sufficiently strong governmental interest in regulating PACs that do not coordinate their expenditures with candidates for office.

Finally, we remand for additional proceedings on the issue of how Act 64 implicates the ability of a state and local party affiliates to receive funds from national affiliates. Act 64 apparently limits the transfer of money from national to state and local parties, and that limit might impose a significant burden on political parties. Vt. Stat. Ann. Tit. 17, §§ 2801(5), 2805(a)-(b). How a party allocates money between its national, state and local affiliates constitutes an important component of party organization. It determines who in the party exercises decision-making authority, who speaks for the party, and how the party arranges its internal finances. At the same time, the failure to limit such transfers might create a loophole that would easily enable contributors to circumvent the $2000 limit on gifts to state parties. *See McConnell,* 540 U.S. at __, 124 S.Ct. at 671 (upholding federal legislation "sharply curbing" the ability of donors to circumvent contribution limits by channeling nonfederal or "soft" money through state political committees to finance "Federal election activity"). The District Court never made specific findings of fact regarding this issue, including how national and local affiliates of the political parties interact and how limitations on transfers of money might affect parties. Since we are reluctant to rule on this issue without the benefit of findings of fact on how such a provision might be expected to operate, we remand for further proceedings.

C. The Related Expenditure Provision is Constitutional as to Contributions

We also affirm the District Court's holding that the "related expenditure" provisions of Act 64 are constitutional because they serve to reinforce the anti-corruption goals of

the contribution limitations. Pursuant to Act 64, "related expenditures" on behalf of a candidate by a third party count toward the third party's contribution limit as well as the candidate's expenditure limit. The Act defines related expenditures as those "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c). The plaintiffs challenge the provision on three grounds: (1) the phrase "facilitated by" is vague; (2) political parties and PACs should have greater abilities to engage in coordinated expenditures with candidates; and (3) the Act's rebuttable presumption that an expenditure benefitting six or fewer candidates is a related expenditure is a content-based speech restriction discouraging advertisements about a small number of candidates. We reject each claim.

Plaintiffs argue that the "facilitated by" standard is vague because it leaves open the possibility that *any* communication about a candidate's views with a third party that then undertakes independent expenditures will qualify as a contribution. The First Amendment permits the treatment of "coordinated expenditures" as contributions to a candidate. *Buckley,* 424 U.S. at 46-47. Independent expenditures may not be limited because "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo." *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 498 (1985). The plaintiffs' objection to Act 64 is really one which assumes that the word "facilitated" has its broadest meaning, akin to giving any aid in support of the third-party expenditure. If that were what the statute meant, then we would agree that the provision might raise constitutional problems.

We think that, in light of the terms "solicited by or approved by" that accompany it, the term facilitated should be given a narrower reading. Such a reading would also

resolve the ambiguity of the statutory language so as to guarantee the constitutionality of the statute. *See* William Eskridge, *Legislation: Statutes and the Creation of Public Policy,* 873-89 (3d Ed. 2001) (discussing canon of constitutional avoidance). Accordingly, we construe the phrase "facilitated by" as requiring some "prearrangement" or "coordination" with the candidate. *Nat'l Conservative Political Action Comm.,* 470 U.S. at 498. Under such a construction, sharing routine information about a candidate is not sufficient to meet the "facilitated by" requirement. Thus, the provision is not constitutionally inval*id.*

Nor is there any constitutional barrier to applying this provision to related expenditures by PACs and political parties. The plaintiffs' argument on this point substantially restates their claim discussed above—that different contribution limits ought to apply to PACs and political parties. We reject it for the same reasons.

Finally, the provision's rebuttable presumption, which presumes that expenditures by political parties or PACs that benefit six or fewer candidates are contributions to those candidates, does not violate the Constitution by chilling protected speech. The plaintiffs argue that the presumption is unconstitutional because (1) the law may never presume that an expenditure is coordinated and (2) the presumption could never be rebutted and, as a result, chills independent advocacy of particular candidates. We find neither claim persuasive.

The Constitution does not bar the use of rebuttable presumptions in this context. The plaintiffs base their argument on *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604 (1996) *(Colorado Republican I).* There, the Supreme Court struck down a federal provision that automatically treated all party expenditures, including those made independently, as contributions to candidates. The Court rejected the Court of

Appeals' analysis that the government was entitled to a conclusive presumption that party expenditures are coordinated. *Id.* at 619. The fact that the presumption was conclusive, however, played the critical role in that decision: it eliminated the need for a finding that the expenditures were in fact coordinated and foreclosed the possibility of a defense. *Id.* at 625. Act 64 does nothing of the sort, since its presumption is rebuttable.

The plaintiffs' argument that the presumption is functionally conclusive because one "cannot prove a negative" is, at least in the legal arena, inaccurate. There are ample strategies that an accused party can employ to demonstrate that an expenditure was truly independent from the candidate it supported. The party can, for example, testify that no discussion took place with the candidate about advertising strategies, including the sharing of information about advertising plans. Candidates can testify that they never gave feedback on an independent advertising scheme or that the third parties never solicited such feedback. Adjudicative bodies can take such evidence, or other similar testimony, as proof and infer a lack of coordination. For these reasons, we uphold Act 64's rebuttable presumption concerning related expenditures.

D. The 25 Percent Limit on Out-of-State Donations is Unconstitutional

We can find no sufficiently important governmental interest to support the provision of Act 64 that limits out-of-state contributions to 25 percent of all candidate contributions. Unlike all of the other Act 64 provisions at issue in this appeal, the out-of-state contribution limit isolates one group of people (non-residents) and denies them the equivalent First Amendment rights enjoyed by others (Vermont residents). The District Court's decision in this regard should be upheld.

The District Court concluded that Vermont's interest

in eliminating excessive out-of-state contributions was confined to unusually large contributions. 118 F. Supp. 2d at 484. The District Court also noted that many non-residents have legitimate and strong interests in Vermont and have a right to participate, at least through speech, in those elections. *Id.* We find no support in the record for the alternative claim that Vermont has an important interest in singling out one class of contributors for limitations. *See* 1997 Vt. Laws P.A. 64 (H.28) (1997) (finding No. 5) ("Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors."). There are only vague references to the danger of out-of-state contributions, and all refer to the danger of excessively large (not cumulatively great) contributions.

In the two reported decisions on the issue, courts have split on whether limitations of non-resident contributions may be upheld on corruption grounds. The Ninth Circuit has rejected, almost in bright-line form, limitations on non-resident restrictions. In *VanNatta v. Keisling,* the court struck down an Oregon initiative that effectively limited the use of non-resident contributions to 10 percent of total campaign expenditures. *See VanNatta,* 151 F.3d 1215, 12 17-18 (9th Cir. 1998), *cert. denied sub nom., Miller v. VanNatta,* 525 U.S. 1104 (1999); *but see Montana Right to Life Assoc. v. Eddleman,* 343 F.3d 1085, 1091 n.2 (9th Cir. 2003) (suggesting that *VanNatta* was superseded by *Shrink).* Addressing the asserted anti-corruption justification, the court held that the provision suffered from both over- and underbreadth. Its overbreadth stemmed from the fact that it prevented all non-resident contributions once the 10 percent threshold had been reached, even those too small to have any corruptive influence. *See VanNatta,* 151 F.3d at 1221. The provision was underbroad because it did nothing to prevent corruptive *(i.e.,* large) resident contributions; nor did it prevent corruptive non-resident contributions until the 10

percent limit had been reached. *See id.* In other words, the non-resident cap was "not closely drawn to advance the goal of preventing corruption." *Id.*

Because Act 64 contains contribution limits, it does not share all of the flaws of the Oregon statute considered in *VanNatta.* Act 64 does, for example, limit large resident and non-resident contributions. Nonetheless, the provision is overbroad in that it prohibits small contributions from out-of-state sources once the 25 percent threshold has been reached, even though such contributions are no more likely to corrupt than in-state contributions. Under this analysis, sustaining the provision would require an additional explanation for why exactly Vermont has an interest in eliminating such small donations only from non-residents.

The Alaska Supreme Court has attempted to craft such an explanation in *State v. Alaska Civil Liberties Union,* 978 P.2d 597 (Alaska 1999), *cert. denied,* 528 U.S. 1153 (2000). The Alaska law at issue capped out-of-state contributions but at lower percentages than Vermont's law. The court upheld the limitations on the grounds that out-of-state contributions have the ability to distort the Alaskan political system: "These nonresident contributions may be individually modest, but can cumulatively overwhelm Alaskans' political contributions. Without restraints, Alaska's elected officials can be subjected to purchased or coerced influence which is grossly disproportionate to the support nonresidents' views have among the Alaska electorate, Alaska's contributors, and those most intimately affected by the elections, Alaska residents. These restraints therefore limit the 'potential for distortion.'" *Id.* at 617. Put another way, Alaska's "[m]ore than 100 years of experience . . . have inculcated deep suspicions of the motives and wisdom of those who, from outside its borders, wish to remold Alaska and its internal policies." *Id.* The out-of-state limitation, according to this view, restrains their distorting influence. *Id.*

The analysis in the Alaska case is a sharp departure from the corruption analysis adopted by the Supreme Court in *Buckley and Shrink.* Even under the more expansive *Shrink* analysis, the fear was that candidates would become too compliant with the wishes of large contributors because they must rely on private interest groups for funding. The *Alaska* analysis permits limitations not to ensure candidate independence generally, but to limit the influence of one set of people—untrustworthy outsiders. Even assuming that the Alaska Supreme Court is correct that outsiders have bad motives and little to contribute to its political discourse, the government does not have a permissible interest in disproportionately curtailing the voices of some, while giving others free rein, because it questions the value of what they have to say.

The Alaska Court's concern could be understood another way: that when candidates are beholden to fundraisers, and not voters, then large contributions from non-residents distort the system. Again, this problem would endure even if officials were beholden to in-state contributors. Moreover, Vermont's expenditure limitations eliminate the major force behind candidates' excessive reliance on campaign contributors—their need to maximize their ability to raise funds by remaining pliant to the wishes of those who contribute to the political campaign system.

Based on our review of these cases and the governmental interests asserted by the defendants, we are unpersuaded that the First Amendment permits state governments to preserve their systems from the influence, exercised only through speech-related activities, of non-residents. Vermont has asserted no valid interest sufficiently strong to justify the provision, and we therefore hold it unconstitutional. Pursuant to Act 64's severability provision, the unconstitutional provisions should be severed.

CONCLUSION

In summary, we conclude that Vermont has a sufficiently important governmental interest in support of Act 64's contribution limits—fighting the real and apparent corruption that accompanies unlimited campaign gifts—and that those contribution limits are closely drawn to achieve this goal. Accordingly, except as noted below, we uphold Act 64's contribution limits. Vermont also has established two interests in favor of Act 64's expenditure limitations that, taken together, are constitutionally compelling: namely, protecting the time of candidates and elected officials, and preventing the reality and appearance of corruption. Although we find that these limits permit candidates for public office to engage in effective campaigns, additional fact-finding is required to complete this narrow tailoring inquiry. On remand, the District Court must determine whether the legislature might have chosen either another type of regulation or higher limits that would still achieve the goals we sanction and yet impinge less on the First Amendment rights at stake.

For the reasons set forth, we affirm the District Court's holdings that the following provisions of Act 64 are constitutional: (1) the limit on contributions that candidates may accept from individuals or political action committees (§ 2805); (2) the limit on contributions that political action committees and political parties may accept from any source (§ 2805(a)); (3) the definition of political parties as including state, county and town entities (§ 2801(5); and (4) the classification of related expenditures as contributions (§ 2809(a)). We also affirm the District Court's finding that the limits on contributions from non-Vermont residents and organizations (§ 2805(c)) are unconstitutional and we uphold its injunction against enforcement of that provision.

We vacate the District Court's injunction against enforcement of the limitation on contributions by political

parties to candidates (§ 2805(a)). We also vacate the judgment and remand for further proceedings with respect to the constitutionality of (1) limiting candidate expenditures (§2805a); (2) treating the "related expenditures" of third parties as candidate expenditures (§ 2809(b)); (3) restricting the ability of PACs to make wholly independent expenditures, to the extent the Act's provisions are read to impose such restrictions (§§ 2801(4), 2805(g)); and (4) limiting transfers of funds from national to state political party affiliates (§§ 2801(5), 2805(a)-(b)). Finally, we affirm the District Court's injunction against enforcement of Act 64's expenditure limitations, pending further proceedings.[29]

In vacating aspects of the District Court's injunction, we are mindful that Act 64's limitations are premised on a two-year election cycle. Given that further proceedings must be held, we remand to the District Court the issue of when the various limitations revived by this opinion should be given effect. We thus authorize the District Court to designate an appropriate effective date for these limitations that causes the least disruption to the current election cycle.

Each party shall bear its own costs on this appeal.

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[29] Because our original opinion was withdrawn, the petition for rehearing as to that opinion became moot. Upon the filing of this substituted opinion, however, the parties may, if they so desire, file petitions for rehearing as though this were our original decision.

Landell v. Vermont Public Research, No. 00- 9159

WINTER, Circuit Judge, dissenting,

I concur in part in the result reached by my colleagues' opinion. I respectfully dissent from their holdings as to Act 64's limits on expenditures by candidates, including "related expenditures" by individual supporters and political parties, and as to the Act's forced centralization of local political parties. In view of the length of this separate opinion, I begin with a table of contents.

[On advice from the Office of the Clerk for the United States Supreme Court the table of contents has been omitted, as the reformatting of this appendix has rendered the pagination inaccurate.]

I. INTRODUCTION

On August 7, 2002, my colleagues filed an extensive majority opinion in this matter. I filed a partial dissent that was almost as long as the majority opinion. Although our opinions, subsequently vacated by my colleagues, were a clear and present danger to the forests of the nation, they failed to join issue in many ways.

My colleagues' opinion in the main adopted the stated purposes of the Vermont legislature and the opinions of its proponents as sufficient constitutional justifications for Act 64. My dissent was largely a detailed statutory analysis of Act 64, concluding that it limits or prohibits a vast range of ordinary political activities. The dissent also discussed the Act's pervasive ambiguities to be resolved through the often *ad hoc* discretionary decisions by those who must administer it and was critical of my colleagues for viewing the Act through the prism of what its proponents said about it instead of what the Act itself says.

Although my dissent has been substantially revised to address issues raised by my colleagues' decision to remand rather than reverse with regard to the expenditure limits issue, to elaborate in more detail the evidence that Act 64 is intended to protect incumbent legislators, and to provide a more particularized discussion of the evidence in the record, not much has changed since my colleagues vacated our earlier opinions. Their revised opinion does not discuss or even mention, to take only a few examples, the following concrete effects of Act 64:

> (i) Act 64's limits on expenditures are so low that they are below the amount spent in the past by third-party candidates, *see infra* Part IV (b)(1)(C);

(ii) Act 64 limits a candidate who must run in both a primary and general election to the same expenditures as an opponent who runs only in the general election, *see infra* Parts III(b), IV(c);

(iii) a favorable press editorial after an interview with a candidate must be valued and treated as a contribution to, and expenditure by, the candidate's campaign subject to Act 64's limits, *see infra* Parts III(g), IV(d);

(iv) according to Vermont's Secretary of State, if a candidate provides a photo or written materials to a person who uses the photo or materials in a publication, the candidate must treat the cost of the publication as an expenditure by the candidate, *see infra* Parts III(g), IV(d); *Appendix A*;

(v) the draconian limits on the activities of autonomous local units of political parties resulting from Act 64's requirement that funding for all local activities, such as a town committee picnic, must be from a single statewide party bank account with the permission of the person who controls that account, *see infra* note 1, Part IV(a)(2), (e);

(vi) the need for campaign volunteers to keep records of every mile they drive to meetings, to campaign events, or on other campaign business over a two-year period, *see infra* Parts III(e), IV(a)(1);

(vii) the need of a campaign to treat the miles driven by volunteers as a campaign expenditure subject to Act 64's limits (and to keep records and report that mileage), and to prohibit further driving by volunteers whenever limited (by Act 64) campaign resources are needed for other activities or the expenditure limits have been reached, *see infra* Parts III(e), IV(a)(1); or

(viii) the restrictions on ordinary homeowners wanting to hold meet the candidates events (and again the need for a candidate's campaign to record and limit such events as campaign expenditures), *see infra* Part IV(a)(1).

My colleagues now remand Act 64's expenditure limits principally for an inquiry into whether the Vermont legislature considered somewhat higher limits as a less restrictive alternative. Even putting aside the Supreme Court's holding that expenditure limits are *per se* unconstitutional, *see Buckley v. Valeo*, 424 U.S. 1, 45, 54, 57 (1976) (*per curiam*), that language used in Act 64 is unconstitutionally vague, 424 U.S. at 44, 80, *see infra* note 6, and the fact that, even under the standard applied by my colleagues, the levels of Act 64's limits are unconstitutionally low and clearly protective of incumbents, the remand is something of an oddity. First, it involves largely legal issues described by my colleagues as factual. Second, the issue should be whether less restrictive alternatives exist, not whether the Vermont legislature considered them. Third, the degree of an alternative's restrictiveness cannot be evaluated without knowing what is restrictive, and to what degree, about the law in question. However, the only discussion of Act 64's specific restrictions on political activity is found in this dissent.

Fourth, a speech-supportive and constitutionally sound alternative -- a combination of private and public financing with low contribution limits -- is obviously available. In fact, Act 64 itself limits contributions to such small amounts -- $400 for statewide candidates, $300 for Senate candidates, and $200 for House candidates -- that there is no evidence showing that the possibility of improper influence on officeholders is at present anything but negligible.

I therefore respectfully continue to dissent as to the constitutionality of two aspects of Act 64. *See* 1997 Vermont Campaign Finance Reform Act (codified as Vt. Stat. Ann. tit. 17, §§ 2801-2883) ("Act 64"). Those aspects are Act 64's limits on expenditures by candidates, including related expenditures by individual supporters and political parties, and its restrictions on fundraising and spending on party-building activities by state, county, and local committees of a political party. *Id.* §§ 2801(5), 2805a. Otherwise, based on Supreme Court precedent, I concur in the result reached by my colleagues.

II. APPLICABLE CONSTITUTIONAL PRINCIPLES

a) Overview

Neither Act 64's limits on expenditures nor its restrictions on independent fundraising and expenditures by state or local party committees involve new issues of constitutional law.

Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*), held, without qualification, that government may not limit campaign expenditures by candidates for electoral office. *Id.* at 45, 54, 57. Act 64 limits such expenditures notwithstanding *Buckley*. Indeed, the proponents of Act 64 never doubted its unconstitutionality under *Buckley* and

enacted it for the explicit purpose of creating a vehicle for litigation to overturn *Buckley*. *See infra* note 2 and accompanying text. Act 64's limits on expenditures violate the First Amendment because they limit a broad spectrum of political speech and activity, including ordinary grassroots activities and editorializing and reporting by the press, for no permissible purpose. Further, they entrust those who enforce the law with unfettered, and unconstitutional, discretion to determine, often on an *ad hoc* basis, what acts of political advocacy are permitted and what are prohibited. Even if expenditure limits were not *per se* unconstitutional, the low level at which the limits are set by Act 64 so heavily favors incumbents that it can be upheld only by application of a legal test similarly skewed toward incumbents. *See infra* Part V(d).

Moreover, Act 64 treats a contribution to a local political party affiliate as a contribution to all affiliates and requires that all such contributions be initially deposited in the state party bank account. *See infra* note 1. This means that all funding for a local affiliate's activities -- even for a six-pack of diet soda for a town committee picnic -- must be approved and paid by the person who controls that statewide account. At a stroke, and without any proffered reason, much less a statement of a compelling governmental interest, this revolutionary provision destroys the autonomy of local affiliates of political parties from each other and from the state party organization , and thereby violates both freedom of speech and freedom of association.

Act 64 suppresses ordinary political activity at every level of the electoral process. It reflects the philosophy of one witness for the defense who testified that government ought to regulate political speech the way it regulates public utilities. Trial Tr. vol. V at 167 (Helen David-Friedman). Act 64 may be a popular law -- although this dissent will note several instances of great disquiet and even shock among

proponents upon learning what it actually says -- but only because its proponents systematically divert attention from the law's actual provisions to the nobility of their goal -- here the transfer of political power from "special interests" to "ordinary citizens." Maj. Op. at 40, Appellant's Br. at 24-29; Trial Tr. vol. IX at 57-62 (Gordon Bristol); *id.* at 137 (Elizabeth Ready); Trial Tr. vol. VII at 88 (Cheryl Rivers); Trial Tr. vol. VIII at 63-64 (Peter Smith). However, even this attractive rhetoric cloaks sinister purposes. Foiling "special interests" while empowering "ordinary citizens" is a rhetorical staple of electoral politicians of every viewpoint because the terms are used as synonyms for one's opponents and supporters respectively. In this light, the pursuit of this goal through the regulation of political speech is the road to the suppression of opponents.

As Justice Brandeis once noted, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). And Justice Black has reminded us that "[h]istory indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'" *Beauharnais v. Illinois*, 343 U.S. 250, 274 (1952) (Black, J., dissenting). Act 64, which has its greatest impact in silencing those ordinary citizens whose active participation in politics takes place through organized groups, provides us with a modern reminder of the wisdom of those two statements.

b) Money and Protected Political Speech

The activities limited by Act 64 are the ordinary stuff of democracy that constitutes the core of the conduct protected by the First Amendment. There is "practically universal agreement that a major purpose of [the First] Amendment was to protect" political speech. *Mills v. Alabama*, 384 U.S. 214, 218 (1966), *quoted in McIntyre v.*

Ohio Elections Comm'n, 514 U.S. 334, 346 (1995). Indeed, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S. at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

As *Buckley* held, because money is needed for access to resources of communication, any limit on the use of money for political speech is a limit on that speech. 424 U.S. at 19. Political speech without an audience is not worth the effort. Political speakers must therefore go to where voters are or speak through a medium that voters watch or hear. Without resources of communication, no speech is effective. Without money, resources are not obtainable. Cars use gas. Gas costs money. A candidate who has reached Act 64's limits on expenditures and may not even drive the family car to a town green to make a speech is as effectively barred from speaking as he or she would be if the law flatly prohibited the speech itself. As the Supreme Court has stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event.

Buckley, 424 U.S. at 19.

Proponents of Act 64 rarely acknowledge this fact in stressing their preference for limiting political speech to the "old-fashioned handshake campaign," Trial Tr. vol. IX at 47 (Gordon Bristol), including "meet and greet" events, Trial Tr. vol. X at 187 (Karen Kitzmiller), such as "spaghetti suppers, "Trial Tr. vol. IX at 221 (Anthony Pollina), "little parties" for "150 people" to which "a couple hundred" people are invited by mail, *id.* at 141-42 (Elizabeth Ready), Rotary Club and Jaycees meetings, Trial Tr. vol. V at 43 (Donald Hooper), booths at county fairs, Trial Tr. vol. IX at 129 (Elizabeth Ready), barbecues, op-ed articles published in the press, *id.* at 135 (Elizabeth Ready), women's groups meetings, "various boards" meetings, Trial Tr. vol. VII at 17 (Toby Young), and so forth. However, all such activities consume resources for which someone makes, or has made, expenditures of money, *e.g.*, use of a vehicle, gas, food, soft drinks, meeting rooms, postage, salaries for editors and deliverymen, a printing facility, and so forth. Act 64's proponents do not recognize these hard facts, but the Act does, and its limits on campaign expenditures directly affect -- either by limiting or requiring a largely discretionary exemption for -- each of the items described above.

c) Freedom to Organize Political Parties

The First Amendment requires that citizens be allowed freely to form political organizations at various levels of government . This protection extends to allowing organizations to be related to each other as affiliates of the same political party while still retaining much local autonomy. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (stating that "political parties' government, structure, and activities enjoy constitutional protection" and noting that a political party has "'discretion in how to organize itself, conduct its affairs, and select its leaders,'") (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 230 (1989)); *see also Buckley*,

424 U.S. at 15 (recognizing the right "'to associate with the political party of one's choice'" and noting that "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association'") (internal citations omitted). Act 64 treats state, county, and local affiliates of a political party as a single aggregated unit for purposes of fundraising and contribution limits, *see* Vt. Stat. Ann. tit. 17, § 2801(5), and requires that all contributions to a political party so defined be initially deposited in a single, statewide checking account.[1] As a result, local affiliates can raise and spend

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[1] Act 64 contains the following pertinent provisions. It states, by way of definition:

"Political party" means a political party organized under chapter 45 of this title or any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional affiliates of the party.

Vt. Stat. Ann. tit. 17, § 2801(5). In particular, it is this definition that governs the application of both the limits on contributions to, and expenditures by, "political parties," *e.g.* any contribution to an affiliate of a party is a contribution to all affiliates and the state party.

The Act further provides:

Candidates who have made expenditures or received contributions of $500.00 or more and political committees shall be subject to the following requirements:

(1) All expenditures shall be paid by check from a single checking account in a single bank publicly designated by the candidate or political committee.

(2) Each candidate and each political committee shall name a treasurer, who may be the candidate or spouse, who is responsible for maintaining the checking account.

Vt. Stat. Vt. Stat. Ann. tit. 17, § 2802.

Each political committee and each political party which has accepted contributions or made expenditures of $500.00 or more shall register with the secretary of state stating its full name and address, the name of

money only through access to, and with the permission of, whoever controls that bank account.

d) Sufficient Governmental Interests

The Supreme Court has held that only the prevention of "corruption or the appearance of corruption" constitutes a sufficiently compelling interest to limit contributions to candidates. *See Buckley*, 424 U.S. at 25-28 (holding that limiting the actuality and appearance of corruption is a "constitutionally sufficient justification" for a contribution limitation, but dismissing other proffered justifications for the limitation). It has also held, however, that neither the anti-corruption rationale, the interest in equalizing the financial resources of candidates, nor the increase in money spent on political campaigns justifies the limiting of amounts that candidates for office may spend to promote their candidacy. *Id.* at 45, 54, 57. Indeed, the Court has stated that

> [t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people -- individually as citizens and candidates and collectively as associations and political committees -- who

its treasurer, and the name of the bank in which it maintains its campaign checking account within ten days of reaching the $500.00 threshold.

Vt. Stat. Ann. tit. 17, § 2831(a).

I do not read these provisions to prevent local affiliates from having separate bank accounts. I do read them, however, to require that all contributions to parties go initially to the single checking account mentioned in Section 2831 for purposes of reporting and enforcing the limits on contributions to parties. Withdrawal from that checking account must be only with the consent of those authorized to sign checks.

> must retain control over the quantity and range of debate on public issues in a political campaign.

Buckley, 424 U.S. at 57.

Since *Buckley*, the Court has adhered to the distinction between the regulation of contributions and the regulation of expenditures. *See Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 440-41 (2001) ("*Colorado II*"). In *Colorado II*, the Court made the statement, reaffirmed even more recently in *McConnell v. Federal Election Comm'n*, 540 U.S.___, 124 S. Ct. 619, 655 (2003), that "ever since we first reviewed the 1971 Act, we have understood that limits on political expenditures deserve closer scrutiny than restrictions on political contributions," because "[r]estraints on expenditures generally curb more expressive and associational activity," and "limits on contributions are more clearly justified by a link to political corruption." *Id.* The Court went on to state that "*[g]iven these differences, we have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups,* while repeatedly upholding contribution limits." *Id.* at 441-42 (citations and footnotes omitted) (emphasis in original).

One would think that the unqualified statements of the Supreme Court regarding the unconstitutionality of expenditure limits might be the end of the matter at this level of the court system, particularly since the sponsors of Act 64 have made no secret of their intention to enact it in order to provoke a test case to overrule *Buckley* with regard to expenditure limits. *See Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont's Campaign Finance Law* (Jan. 9, 2001), *available at* http://vermont-elections.org/elections1/2001GAMemoCF.html ("*2001 Memorandum*"); *see also*

Hearing on H. 28 Before the Vt. House Comm. on Local Gov't, 64th Biennial Sess. (1997) (statement of Anthony Pollina); *Hearing on H. 28 Before the Vt. Senate Comm. on Gov't Operations*, 64th Biennial Sess. (1997) (statement of Sen. William Doyle); Vt. House Comm. of Conf., *Report on Campaign Finance*, H. 28, 64th Biennial Sess. (1997).[2] However, the views of my colleagues require that I describe in some detail why Act 64 is unconstitutional in the particular respects noted above, even under the constitutional test that they create.

e) Requisite Precision of Regulation

There is another body of First Amendment jurisprudence that is of relevance here: Any regulation of protected speech must embody valid criteria sufficiently precise to ensure that officials apply those criteria. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (stating that the Supreme Court has "required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review"); *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 131 (1992) ("'[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'")

[2] The desire to challenge Buckley, even at the cost of living under a bad law, is exemplified by an astonishing statement of Vermont's Secretary of State. In transmitting to the Vermont legislature a review of the operation of Act 64, she cautioned against any amendment or repeal that would render the present litigation moot, even if the legislature thought the amendment or repeal in the public interest, because such an action would "frustrat[e] the express legislative goal of giving the Supreme Court an opportunity to reevaluate its decision in Buckley v. Valeo." See 2001 Memorandum, supra.

(quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)). Otherwise, the officials who administer the law will have the discretion to fashion and apply their own criteria without restraint. *See Thomas*, 534 U.S. at 323 ("Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content."); *Forsyth*, 505 U.S. at 131 ("If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.") (internal citations omitted).

Far from precise, much of Act 64 is more a theory than a body of legal rules. What it actually means in practice has been, in a literal multitude of critical respects, simply left to future executive or judicial rulings. Act 64 bristles with interpretive issues -- the meaning of "anything of value," "candidate," "for the purpose of influencing an election," "primarily benefits six or fewer candidates," "single source," "affirmative action to become a candidate," "services by individuals volunteering their time," and so on -- and with valuation questions -- of mileage, use of a room, office, computer, phone, professional services, etc. -- and leaves resolution of all of these issues to those who must administer and enforce the statute. *See* Vt. Stat. Ann. tit. 17, § 2801; *2001 Guide*, *supra*; *see also* discussion *infra* Part III (h).

f) Appropriate Level of Scrutiny

It is standard First Amendment jurisprudence that governmental restraints on protected speech must be subjected to exacting scrutiny to survive a constitutional challenge. *See Buckley*, 424 U.S. at 16, 44-45 (referring to the "exacting scrutiny required by the First Amendment," and applying exacting scrutiny to "limitations on core First

Amendment rights of political expression"); *Smith v. California*, 361 U.S. 147, 151 (1959) (applying "stricter standards" to a statute that has "a potentially inhibiting effect on speech," and noting that "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser") (citing *Winters v. New York*, 333 U.S. 507, 509-10, 517-18 (1948)); *see also McIntyre*, 514 U.S. at 347 (applying exacting scrutiny to invalidate an Ohio law that prohibited the distribution of anonymous campaign literature); *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (holding that a statute prohibiting use of paid petition circulators burdens core political speech and is therefore subject to exacting scrutiny); *Lerman v. Bd. of Elections*, 232 F.3d 135, 146 (2d Cir. 2000) (applying "exacting scrutiny" to restriction of "core political speech" in overturning local residency requirement for petition witnesses).

The most exacting scrutiny must be given to legislation that expressly seeks to reallocate political power -- in the view of Act 64's proponents, from "special interests" to "ordinary citizens" -- by limiting the political activity of candidates for office and their supporters. *See Buckley*, 424 U.S. at 14-15 (calling political campaigns the "fullest and most urgent application" of the First Amendment guarantee, and invoking the "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'") (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

As Justices Brandeis and Black have reminded us, the high-mindedness of a law's proponents is no guarantee that it does not flagrantly violate principles of freedom of expression. This is particularly true with regard to legislation that was, as I detail in Part VI(d) of this dissent, examined in the legislative process more for the nobility of its stated purposes than for what it actually says. Since Act 64's passage, surprise at its actual provisions and actual effects

has been expressed by many of the law's proponents.[3] Notably, one vigorous supporter who has been described as its author, Anthony Pollina, *see Vermont Reformer Says Law*

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[3] Surprise at the actual provisions of campaign finance laws is as old as the laws themselves. A veteran civil-liberties lawyer tells the following story. "In the summer of 1972, three old-time dissenters came into the offices of the New York Civil Liberties Union in Manhattan and told an extraordinary story. In May of that year they and a few like-minded others had drafted and sponsored a two-page advertisement that appeared in The New York Times. The advertisement was sharply critical of Richard M. Nixon, the President of the United States. The ad claimed that President Nixon had authorized the secret bombing of Cambodia, in violation of international law, and should be impeached and removed from office. The ad set forth the text of an impeachment resolution that had been introduced in the House of Representatives and contained an "Honor Roll" listing eight House members who had co-sponsored that resolution. The advertisement cost approximately $17,850, and the ad hoc group called itself the National Committee for Impeachment. Before the ink on the ad was barely dry, the group was sued by the United States Justice Department for running the advertisement.

When Randolph Phillips, one of the sponsors of the ad, told this story to the lawyers at the New York Civil Liberties Union, we were incredulous.

How could a group of citizens be sued by the Federal Government for publishing a criticism of the President of the United States? After all, this was 1972, and First Amendment law seemed at its most vigorous in the protections of public speech, one of the shining legacies of the Warren Court. What possible justification could the government have for suing this small group of protestors? We soon discovered the answer: campaign finance reform." Joel M. Gora, *No Law . . . Abridging*, 24 Harv. J.L. & Pub. Pol'y 841, 842-43 (2001) (reviewing Bradley A. Smith, *Unfree Speech* (2001)) (footnote omitted). The law in question was the Federal Election Campaign Act of 1971, which defined a political committee as any group that spent more than $1,000 annually "for the purpose of influencing" -- language used in Act 64 -- a federal election and imposed various requirements on a committee's purchase of advertisements relating to a federal candidate. *See United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1139 (2d Cir. 1972).

He Authored is Unconstitutional, Political Finance, The Newsletter, March, 2002, has since sought to run for office and brought a lawsuit claiming that Act 64 violates the First Amendment. *See* Ross Sneyd, *Progressives Sue to Ensure Public Financing for Pollina*, Associated Press, Mar. 12, 2002.

Moreover, high-mindedness is, for some, a mode of self-deception obscuring self-serving motives or, for others, a facade useful in disadvantaging political opponents, routinely referred to as "special interests." When campaign finance legislation is considered by those in power, there is both motive and opportunity to craft rules that will restrain the political activity of opponents. My colleagues caution that the self-interest of incumbents should not cause us to presume that such legislation is unconstitutional. However, most of the major factual premises underlying Act 64 posit incumbents who value reelection over their duties to constituents and personal honor. These premises should not hold center stage when examining the ostensible justifications for Act 64 only to disappear when scrutinizing what its actual effects will be.

I also note that some of Act 64's proponents relied upon and quoted by my colleagues have themselves demonstrated the importance of self-interest among its supporters. For example, one (then) incumbent state senator testified that Act 64 was needed to stop the "arms race" in which some of her opponents buy "ads" and "yard signs" that catch voters' attention and cause voters to wonder whether she is running for reelection. Trial Tr. vol. IX at 148 (Elizabeth Ready). Another, as noted, brought a constitutional challenge to Act 64 when it impeded his political career.

Moreover, our experience in a similar area suggests that great caution is in order where incumbent legislators

pass laws affecting their electoral fate. Legislatures can directly affect the outcome of elections through two kinds of legislation: reapportionment and campaign finance regulation. Our experience with reapportionment is that, over time, the self-interest of incumbents has become the sole guiding star. *See infra* Part IV(c).

Indeed, whenever Congress takes up legislation involving campaign finance, the press now openly discusses how various proposals will affect the prospects of particular political parties and candidates. *See, e.g.*, Ruth Marcus & Dan Balz, *Democrats Have Fresh Doubts on "Soft Money" Ban; Some Fear GOP Would Gain Edge in Campaign Finances*, Washington Post, Mar. 5, 2001, at A1; John Mintz, *McCain's "Soft Money" Pledge Alarms GOP; Republican Leaders Say Curbs Would Hurt Party's Election Chances, Give Fund-Raising Edge to Democrats, Labor Unions*, Washington Post, Feb. 22, 2000, at A6. The assumption that these possible effects never enter the minds of the candidates for reelection who enact such legislation might be questioned by even the least cynical observer. Truly searching scrutiny of campaign finance legislation is therefore essential.

I respectfully submit that my colleagues have not given this legislation careful, much less exacting, scrutiny. Their opinion describes the provisions of Act 64 in only cursory fashion. In a show of deference exceeding even that accorded decisions of an administrative body, it accepts the theory and factual assumptions proffered by the law's supporters at face value even when their actions belie their words. *See infra* Part VI(d) (failure to comply with reporting requirements); *infra* Parts IV(b)(1)(C), IV(c) (spending more than Act 64's limits); *supra* Part II(f) (bringing a lawsuit to challenge the constitutionality of the Act); *infra* V(e) (same). And it ignores the holding of *Buckley* that expenditure limits are *per se* unconstitutional.

Even without the direct precedent of *Buckley*, First Amendment jurisprudence does not allow laws that burden and prohibit political advocacy to be justified by the proffer of a theory based on spoken and unspoken factual assumptions without the most exacting judicial scrutiny of that theory, those factual assumptions, and the actual provisions of the law as enacted. Such scrutiny requires an examination of the details of the law passed, the degree of burden it imposes on protected speech, and the interests asserted as its justification. Accordingly, I turn to what *Buckley* directs as the first step of constitutional analysis, the details of the law challenged. 424 U.S. at 12.

III. THE PROVISIONS OF ACT 64

a) Overview

Beginning with an overview, Act 64 limits the amount of resources -- money and things of value -- that may be used by candidates in campaigns and that may be provided by individual supporters or political parties.[4] *See* Vt. Stat. Ann. tit. 17, §§ 2805, 2805a. It therefore contains limits on direct expenditures of money or use of things of value by candidates for electoral purposes and on direct contributions of money or things of value to campaigns. *See id.* Such limits would not necessarily reach activities that consume resources purchased and used by individuals and political parties to support a candidate's campaign. However, Act 64 styles these activities "related expenditures" and treats them both as candidate expenditures and as

[4] Because other provisions of Act 64 strike at the heart of the democratic political system, I will note only in a footnote one egregiously overreaching provision. Act 64 requires that all political advertisements identify who paid for them, with an address, and which candidate is benefitted. The Secretary of State has sought an exemption from this requirement for buttons and lapel stickers. *See 2001 Memorandum*, *supra*. So far, she has been unsuccessful.

contributions to a candidate subject to the statutory limits on those expenditures and contributions. *See id.* §§ 2809 (a), (b). Act 64 also requires that, for purposes of applying the limits, contributions to, and campaign expenditures by, state, county, and local affiliates of political parties are determined by aggregating, that is, by treating all affiliates as a single unit. *See id.* §§ 2801(5), 2805(a), 2809(d). To that end, Act 64 requires that all money raised by state, county, and local affiliates be put in a single bank account. *See supra* note 1, and accompanying text.

Act 64 provides a public financing option for candidates for Governor and Lieutenant Governor. *See id.* §§ 2851-2856. Eligibility for public financing turns in part on Act 64's definitions of "contributions" and "expenditures," and, therefore, of "related expenditures." Were a candidate to raise or expend more than $500 before February 15 of the election year -- or have supporters, including a political party, make related expenditures in excess of that amount -- the candidate would not be eligible for public financing. *See id.* § 2853 (a).

An effort like Act 64 of course must provide some definition of the conduct regulated and the substance of what is prohibited and what is permitted. Where limits on campaign expenditures and contributions are imposed by dollar value, a time frame must be selected. The statutory scheme must also include an enforcement scheme, a delicate matter when electoral speech by candidates and their supporters is regulated by governmental officials -- often their opponents -- and a multitude of statutory ambiguities and problems of interpretation and valuation abound. Scrutiny of the details of such regulation is necessary to inform the constitutional inquiry regarding the degree of impact on protected speech and conduct, the requisite nexus between the regulation and constitutionally permissible goals, and the accuracy, reliability, and likely adherence to

those goals of the designated enforcement mechanisms.

b) Two-Year Cycle

As noted, establishing a basic legal framework for regulating political campaigns first requires selection of a time frame(s) for the provision of public financing and for totaling candidate expenditures, contributions, and related expenditures by individuals and political parties in order to enforce limits on their size. Act 64 is schizophrenic in that regard. For purposes of public financing, it establishes separate time periods and separate funding for primary and general elections in recognition of the obvious fact that some candidates must fund both a primary and general election campaign while others need fund only a general election. *See id.* § 2 855 (a).

For purposes of limiting contributions and expenditures, however, Act 64 imposes a so-called "two-year cycle" approach. *See id.* §§ 2805(a), 2805a(a); *see also 2001 Guide*, *supra*. Under that approach, expenditures by candidates, contributions, and related expenditures by individuals and political parties supporting candidates are totaled over a two-year period for purposes of enforcing the statutory limitations. The effect of the two-year cycle is not inconsequential. Vermont, like most American states, provides both for primaries and for subsequent general elections. *See* Vt. Stat. Ann. tit. 17, §§ 2103(15),(25), 2351. Because the two-year cycle lumps these elections together, contribution and expenditure limits, including related expenditures by individuals and political parties, are imposed on the total raised and spent by individual candidates in both electoral periods. In other words, Act 64 limits a candidate who must wage a serious primary fight to the same amount of total financing as his or her general election opponent who did not face a primary contest.

The two-year cycle introduces another complexity -- and creates much room for anti-democratic manipulation -- because party primaries in Vermont are not restricted to voters registered in the particular party but are open to all voters, including those registered in other parties. *See id.* § 2363; *see also* Ian Urbina, *Leveling Politics in the Green Mountain State*, The American Prospect, Sept. 25, 2000, at 41 (discussing Vermont's cross-over voting in primaries); *Vermont's Senate Race, The Common Man*, The Economist, Sept. 5, 1998, at 25. The amount that a candidate must spend in a primary, therefore, may be substantially affected by voters who are seeking to disadvantage the candidate in the general election.

c) Limits on Expenditures by Candidates

Act 64 defines candidate "expenditures" to include "payments, distributions, and disbursements of money or anything of value for the purpose of influencing an election." Vt. Stat. Ann. tit. 17, § 2801(3).[5] The breadth of this language is indisputable. Given its ordinary meaning, the language includes the value of the use of phones, computers, offices, rooms in residences or elsewhere, paper, pencils, autos, etc. *See 2001 Guide*, *supra*; *1999 Memorandum*, *supra*. For example, according to Vermont's Secretary of State, a candidate's use of an auto is an expenditure. *See 2001 Memorandum*, *supra*. Candidates therefore may not drive their personal vehicles for campaign purposes without

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[5] The pertinent provision reads:

> "Expenditure" means a payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates.

Vt. Stat. Ann. tit. 17, § 2801(3).

recording every mile driven and treating the costs of that driving as a campaign expenditure. *See id.* Vermont's Secretary of State has suggested that 31¢ per mile is an accurate measure of expense for this purpose. *See id.* (She has not changed this figure notwithstanding the facts that the price of gasoline has risen and official Vermont travel is now compensated at 37½¢ per mile. *See* id; Vermont Dept. of Personnel, *Collective Bargaining Agreements*, at http://www.Vermontpersonnel.org/employee/labor_cba.cfm (effective July 1, 2003 to June 30, 2005) (setting mileage reimbursement for Vermont employees at level established by the U.S. General Services Administration, currently 37¢).) These expenditure limits also apply to candidates who exclusively use personal funds to fund their campaigns. *See* Vt. Stat. Ann. tit. 17, § 2805a(a).

Two terms are critical to determining what activities are "expenditures" subject to the limits: "for the purpose of influencing an election," *see id.* § 2801(3), and "candidate," *see id.* § 2801(1). Notwithstanding the assertion of a footnote in my colleagues' opinion,[6] the breadth of the phrase "for the

[6] My colleagues assert that the phrase expenditures "for the purpose of influencing an election" was "upheld" against a claim of unconstitutional vagueness by the Supreme Court in *Buckley*. Maj. Op. at 76 n.26. In fact, what the Court said was virtually the opposite.

The relevant passage in *Buckley* addressed a limit "for the purpose of influencing an election" on expenditures by persons who were neither candidates nor political committees. The "for the purpose of . . ." language was modified by the phrase "relative to a clearly identified candidate." *Buckley* stated that the definition of expenditures was unconstitutionally vague *unless* the adjectival phrase was construed narrowly to apply only to "communications that in express terms advocate the election or defeat of a clearly identified candidate." 424 U.S. at 44 (expenditure limits apply only "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'", id. at n.52; limits struck down on other grounds). As to reporting requirements imposed on persons who were neither candidates nor political committees regarding expenditures and contributions not made to candidates or political committees, the Court also held those to be impermissibly vague unless the phrase "for the purpose of influencing an election" was construed "in the same way" as the aforementioned terms, i.e., to apply only to expenditures and contributions expressly advocating the election or defeat of a clearly identified candidate. Id. at 80.

Act 64 does not contain the language "relative to a clearly identified candidate," and relevant Vermont authorities have not construed Act 64 in this limited manner, see *2001 Guide*, *supra*. As a result, the holding in *Buckley* invalidates Act 64's expenditure limits for vagueness.

purpose of influencing an election" is such as to be in substantial part hopelessly ambiguous and was said by the Supreme Court in *Buckley*[7] to be unconstitutionally vague.

[7] The Supreme Court's recent decision in McConnell did not alter the Buckley analysis. McConnell upheld the phrase "electioneering communication" -- where those funding such communications faced restrictions and disclosure requirements -- against a challenge of unconstitutional vagueness. The term is defined as "'any broadcast, cable, or satellite communication'" that "'refers to a clearly identified candidate for Federal office,'" is made during certain time periods, and "'in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate.'" McConnell, 124 S.Ct. at 686-87 (quoting 2 U.S.C. § 434(f)(3)(A)(i)). A communication is "'targeted to the relevant electorate'" if it "'can be received by 50,000 or more persons' in the district or State the candidate seeks to represent." Id. In upholding the term "electioneering communication," the Court explained that it held "for the purpose of . . . influencing" a federal election unconstitutionally vague in Buckley not because issue advocacy (as opposed to express advocacy) can never be limited, but rather because the limitations on advocacy imposed by that phrase were unconstitutionally vague. Id. at 688. "Electioneering communication," in contrast, could be regulated because it describes only a well-defined subset of issue advocacy. Id. ("In narrowly reading the FECA provisions in Buckley to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line."). Another provision upheld in McConnell against a vagueness challenge was similarly specifically defined. Id. at 675 n.64; 2 U.S.C. § 431(20)(A)(iii) (limits on contributions to fund a "public communication that refers to a clearly identified candidate for Federal office (regardless

424 U.S. at 44, 80; *see supra* note 6. At one end of an interpretive spectrum, that phrase would probably not include a candidate's cost of driving to a town hall to register to vote and, later, of driving to vote, although even that driving fits within Act 64's literal definition of expenditure. At the other end of the spectrum, candidate Jones's purchase of an ad stating "Vote for Jones Next Tuesday" would certainly be an expenditure. Between those extremes are a multitude of activities that may influence an upcoming election but lack an accompanying statement of express purpose. As to these, the statute offers no guidance.

Potentially the most significant area of ambiguity involves activities of incumbent officials. Members of the executive and legislative branches engage in relatively continuous communication with the public that involves the use of resources in a way that will help a reelection effort and would therefore fit within the definition of "expenditure," if done by a "candidate" "for the purpose of influencing an election." For example, Vermont's Secretary of State has a publicly funded website that does not avoid capitalizing on the political opportunity offered. *See Vermont Secretary of State Website*, at http://www.sec.state.vt.us/. The home page features a photo of her with a backdrop of mountains and pine trees. Other pages of the site also find it necessary to include a photo of the incumbent. Such a website not only offers favorable exposure but also involves the preparation of materials easily put to political use as

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of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)," 2 U.S.C. § 431(20)(A)(iii), not unconstitutionally vague because "[t]he words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision," McConnell, 124 S.Ct. at 675).

flyers and ads.[8] The Vermont Democratic Party website

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[8] For example, the central link on the Secretary of State website is entitled "Visit the Secretary's Desk," a section that includes a picture of the incumbent on each page. *Vermont Secretary of State's Website*, at http://www.sec.state.vt.us/secdesk/index.html. This section also houses her "Biography," which includes the following passage:

> As Secretary of State, Markowitz has enhanced the office's services to Vermont's businesses, banks and professionals. She has made customer service a priority and created a state of the art web site to serve the business community. Markowitz has also protected consumers of professional services by reducing the backlog of professional licensing complaints and by starting a public information campaign to inform consumers of their rights to competent professional services. Markowitz has also promoted civics education in Vermont's schools and has encouraged Vermonters to be active participants in democracy by volunteering in town government and by voting.

Id. at http://www.sec.state.vt.us/secdesk/marko.html.

> The Vermont Attorney General's Office has a similar website. The first page houses a photograph of the incumbent, whose biography page reads as follows:
>
> Welcome to the Home Page for Vermont Attorney General William H. Sorrell. The Attorney General is the chief law enforcement officer in the state. He is charged with representing the state in all matters in which the state is a party or has an interest. The office of the Attorney General is dedicated to the protection of the health and safety of all Vermonters
>
> A native and resident of Burlington, Vermont, Attorney General William H. Sorrell graduated from the University of Notre Dame (AB, magna cum laude, 1970) and Cornell Law School (JD, 1974). Bill served as Chittenden County Deputy State's Attorney from 1975-1977; Chittenden County State's Attorney, 1977-78 and 1989-1992; engaged in private law practice at McNeil, Murray & Sorrell, 1978-1989; and served as Vermont's Secretary of Administration, 1992-1997. As State's Attorney, he personally successfully prosecuted several significant matters,

underlines the political usefulness of the official Secretary of State website by offering visitors to the party's website a link to the official site. *See Vermont Democratic Party Website*, at http://www.vtdemocrats.org. *See also Burlington GOP Website*, at http://www.burlingtongop.com (linking to republican Jim Douglas' official Vermont Governor Web site).

The statute offers no guidance on the many questions of how the relevant language is to be applied in practice to incumbents' activities, even though the answers may have a decisive impact on particular candidates. If most of the resource-consuming activities of officeholders are not

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including the first case allowing the admissibility of DNA evidence in a Vermont State Court and a ten-year-old homicide in which the victim's body had never been found.

Governor Howard Dean appointed General Sorrell to fill the unexpired term of now Vermont Chief Justice Jeffrey Amestoy, commencing May 1, 1997. He has enjoyed strong voter support in standing for election in November 1998, 2000 and 2002. His current term of office will expire in January 2005.

Bill is on the board of the American Legacy Foundation; has served on the Judicial Nominating Board; as president of United Cerebral Palsy of Vermont; secretary of the Vermont Coalition of the Handicapped; and on the board of the Winooski Valley Park District Bill has recently been elected the President-Elect of the National Association of Attorneys General (NAAG) and will assume the Presidency of that organization for a one-year term beginning in June of 2004. He is chair of the NAAG Tobacco Committee and co-chair of its Consumer Protection Committee. In June of 2003, Bill was selected by his peers from around the country to receive NAAG's Kelley-Wyman Award, given annually to the "Outstanding Attorney General" who has done the most to further the goals of the nation's attorneys general.

Office of the Vermont Attorney General, at http://www.atg.state.vt.us/display.php?smod=70.

"expenditures" because they occur in the course of the officeholders' public duties, incumbents will have an enormous advantage over challengers under expenditure limits. If most of these activities are "expenditures," an incumbent officeholder might well use the bulk of permitted expenditures in the first year of the two-year cycle. There are also hundreds of intermediary positions, all of which are arbitrary to one degree or another.

Some interpretive guidance, but not much, may be gleaned from the definition of "candidate." A "candidate" is someone who "has taken affirmative action to become a candidate."[9] Contrary to the assertion in a footnote in my colleagues' opinion,[10] the elastic phrase "affirmative action"

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[9] The pertinent provision reads:

> "Candidate" means an individual who has taken affirmative action to become a candidate for state, county, local or legislative office in a primary, special, general or local election. An affirmative action shall include one or more of the following:
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> (A) accepting contributions or making expenditures totalling $500.00 or more; or
>
> (B) filing the requisite petition for nomination under this title or being nominated by primary or caucus; or
>
> (C) announcing that he seeks an elected position as a state, county or local officer or a position as representative or senator in the general assembly.

Vt. Stat. Ann. tit. 17, § 2801(1).

[10] My colleagues assert that the word "candidate" is not vague because candidates know when they are candidates, and because "the notion that candidates do not know when they are candidates is belied by the specificity of the provision itself." Maj. Op. at 76 n.26. The issue, however, is not one of notice but one of enforcement. The question is not whether a candidate knows when he or she is a candidate, but what acts, or in the words of Act 64, "affirmative action[s]," will be deemed by Vermont authorities to trigger expenditure limits for purposes of the

and the self-evident circularity of using a word in its own definition leave ample room for disputes over the definition's meaning. Persons who fully intend to run for office, but have not announced, engage in all sorts of conduct to bring themselves into the public eye, to appear interested and informed on public issues, and to commend themselves as potential candidates to the media and political leaders. They attend meetings of school boards, selectmen, and various public forums. *See* Trial Tr. vol. IX at 135 (Elizabeth Ready). Even these efforts require the use of money or things of value, are intended to influence the outcome of an election, and therefore meet the definition of expenditure if done by a "candidate." That issue thus turns on whether such conduct constitutes an "affirmative action."

A degree of clarity is added by the next sentence of the definition, which states that affirmative action shall include three kinds of acts. However, most of the basic ambiguity is left in place because the use of language of inclusion does not suggest that what follows is an exclusive list of "affirmative act[s]." The first set of included acts involves accepting "contributions" or making "expenditures" in excess of a total of $500. *See id.* § 2801(1)(A). This brings into the definition of candidate all of the ambiguities of the term "expenditure" -- and "related expenditure" -- including the pre-campaign conduct noted above that is fully intended to influence the outcome of an election. In addition, as the Secretary of State has noted, an individual not fully decided upon, but considering, a run for statewide office will trigger the definition of candidacy by driving four round trips between Swanton and Brattleboro at (the now obsolete) 31¢ per mile. *See 2001 Memorandum*, *supra*. A person's official candidacy can also be triggered by acts of the person's

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statute. Resolution of this question on a case-by-case basis ultimately rests within the discretion of some body external to the statute, whether it be the courts or the Secretary of State.

political party deemed to be "related expenditures" valued in excess of $500. *See* Vt. Stat. Ann. tit. 17, §§ 2809, 2853(a); *see also* Ross Sneyd, *Progressives' Poll Raises Question About Public Financing*, Associated Press, Feb. 21, 2002. The two other acts included are filing a petition for nomination or announcing a candidacy. *See* Vt. Stat. Ann. tit. 17, §§ 2801(1)(B), (1)(C). However, these provisions clarify things that were not ambiguous.

> The limits on expenditures by candidates over the two-year cycle vary with the office sought, as follows:
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> Governor - $300,000
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> Lieutenant governor - $100,000
>
> Other statewide offices - $45,000
>
> State senator - $4,000 plus $2,500 for each additional seat in the district
>
> County office - $4,000
>
> State representative, single member district - $2,000, two member district - $3,000.

See id. § 2805a(a).

Incumbents may spend 85% -- except for legislators, who may spend 90% -- of the expenditure limits. *See id.* § 2805a(c).

d) Limits on Contributions to Candidates

"Contributions" are similarly broadly defined as any "payment, distribution, advance, deposit, loan or gift of money or anything of value paid or promised to be paid to a person for the purpose of influencing an election . . . ." *Id.* § 2801(2).[11] The limits apply to "single source" donors, defined as "an individual, partnership, corporation, association, labor organization or any other organization or group of persons which is not a political committee or political party." *See id.* §§ 2801(6), 2805(a). Exempted from the definition of contribution are "services provided without compensation by individuals volunteering their time on behalf of a candidate." Id. § 2 801 (2).

Ambiguities lurk in the words "paid to a candidate" with regard to a resource used in a campaign by the resource's owner, for example, a campaign worker's use of a personal vehicle. Some of these ambiguities are cured in part by the definition of "related expenditures," discussed below.

Uncured are the ambiguities in the term "services provided without compensation" by volunteers. These uncertainties are particularly great -- and very important -- with regard to professional services, particularly legal

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[11] The pertinent provision reads:

> "Contribution" means a payment, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid to a person for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates in any election, but shall not include services provided without compensation by individuals volunteering their time on behalf of a candidate, political committee or political party. For purposes of this chapter, "contribution" shall not include a personal loan from a lending institution.

Vt. Stat. Ann. tit. 17, § 2801(2).

services, which are of great value to a candidate who runs for office under Act 64. A few of the many questions that will arise are: If an employee or partner engages in political activity during working hours and the firm does not dock the appropriate amount of compensation, is that a contribution by the firm? Can professionals who are not solo practitioners provide free professional services to candidates? If a professional is not generally free under a firm's employment arrangements to moonlight professional services to others, is the provision of such services to a candidate in non-working hours a contribution by the firm to the candidate valued according to the firm's usual billing rate? And so on.

The definition of "single source" also contains ambiguities. For example, rendering a non-obvious interpretation, the Secretary of State has stated that partnerships may make contributions as separate entities from the partners themselves, who are free to make identical contributions as individuals. See *2001 Guide*, *supra*. Questions also arise about corporations with only one shareholder, *e.g.*, are professional corporations operated by solo practitioners firms separate from their owners for purposes of the contribution limits?

As noted, the contribution limits also apply to money, goods, or services provided to political parties, and the various affiliates of a party are treated as one unit for the purpose of these limits. That is, a contribution to a Democratic town committee is limited as noted immediately *infra*, *see* Vt. Stat. Ann. tit. 17, §§ 2801(5), 2805(a), and is viewed as a contribution to all Democratic town, county, and state committees. Further, that contribution must be paid into a single statewide bank account, *see supra* note 1 and accompanying text. This provision therefore necessitates statewide reporting and control of spending by affiliates, which can receive funds only from the statewide bank account.

The limits on contributions also vary by office sought and political committee as follows:

Political party/political committee - $2,000

Statewide office - $400

State senate/county office - $300

State representative/local office - $200.

See id. § 2805(a).

e) Limits on "Related Expenditures"

Turning now to "related expenditures," they are defined as "expenditures" (including, therefore, things of value and importing the ambiguities described above) "intentionally facilitated by, solicited by or approved by the candidate." *Id.* § 2809(c).[12] They include "expenditures" by individual supporters of candidates and by the political parties that sponsor the candidates. "Related expenditures" therefore include the value of mileage driven by campaign volunteers, the use by a volunteer of a residence, house phone, or computer, or other expenditures by volunteers for

[12] The pertinent provision reads:

> For the purposes of this section, a "related campaign expenditure made on the candidate's behalf" means any expenditure intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee.

Vt. Stat. Ann. tit. 17, § 2809(c).

items such as paper, pens, etc. They also include the cost of polling, the printed information on candidates, and offices and phones, etc., provided by political parties.

The law regulates "related expenditures" in two ways. First, it treats them as contributions subject to the limits on contributions described above. Every use of an in-kind resource -- car, phone, computer, etc. -- must thus be valued and totaled with direct cash contributions on an ongoing basis. *See id.* § 2809(a). Use of the in-kind resource must cease when the contribution limit is reached.

Second, Act 64 also treats related expenditures as candidate expenditures. When an individual's or party's related expenditures exceed $50, the candidate on whose behalf they were made must treat them as campaign expenditures limited by the statute. *See id.* § 2809(b).[13] This means that, over a two-year period, every supporter of a candidate who drives the family car to campaign meetings or provides paper, pens, phones, refreshments, or rooms for meetings, must keep a running total and, when the total exceeds $50 -- driving an average of seven miles per month at 31¢ per mile triggers this -- the candidate must fit the amount under the statutory limit on candidate expenditures.

As noted, related expenditures include activities of political parties, such as polls, mailings, dinners, and other

[13] Section 2809(b) reads in full:

> A related campaign expenditure made on a candidate's behalf shall be considered an expenditure by the candidate on whose behalf it was made. However, if the expenditure did not exceed $50.00, the expenditure shall not be considered an expenditure by the candidate on whose behalf it was made.

Vt. Stat. Ann. tit. 17, § 2809(b).

events.[14] If such party activities fall within the definition, they must be treated as contributions to, and expenditures by, the candidate. Such activities can, therefore, trigger an official candidacy, destroy eligibility for public financing, or exhaust the total that a candidate may spend in the two-year

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[14] Section 2809(d) reads in full:

> An expenditure made by a political party or by a political committee that recruits or endorses candidates, that primarily benefits six or fewer candidates who are associated with the political party or political committee making the expenditure, is presumed to be a related expenditure made on behalf of those candidates. An expenditure made by a political party or by a political committee that recruits or endorses candidates, that substantially benefits more than six candidates and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity shall not be presumed to be a related expenditure made on a candidate's behalf. In addition, an expenditure shall not be considered a "related campaign expenditure made on the candidate's behalf" if all of the following apply:
>
> (1) The expenditures were made in connection with a campaign event whose purpose was to provide a group of voters with the opportunity to meet the candidate personally.
>
> (2) The expenditures were made only for refreshments and related supplies that were consumed at that event.
>
> (3) The amount of the expenditures for the event was less than $100.00.

Vt. Stat. Ann. tit. 17, § 2809(d).

cycle. *See 2001 Guide*, *supra*; *see also* Vt. Stat. Ann. tit. 17, §§ 2805a, 2853. It will be recalled that the district court struck down the provisions of Act 64 subjecting related expenditures by parties to the Act's contribution limits, *e.g.*, no more than $400 in cash or related expenditures to a candidate for statewide office. Given the holding of *Colorado II*, 533 U.S. at 465, these provisions are now revived.

To illustrate the effect of these provisions, I have added as *Appendix A* a letter from the Secretary of State responding to an inquiry as to whether certain party activities should be deemed related expenditures attributable to a particular candidate. The letter makes it clear that parties and their candidates can avoid the risk of an unexpected attribution of a large sum to a campaign only by eschewing normal and necessary political activities. For example, according to the Secretary of State, there is danger in sharing party-funded poll results with candidates or potential candidates; candidates or potential candidates must avoid any knowledge of party mailings; candidates must avoid participation in planning or even approving a party event (a party event at which a candidate is introduced apparently must be a surprise party); and parties must avoid mailings that have a "primary thrust" of supporting candidates. *See Appendix A*, *infra*. The Secretary and Attorney General wisely advise, "Each party and potential candidate should review proposed activities with their own counsel," *id.*, although this will be difficult for the candidate where he or she must remain ignorant of the event.

f) Costs of Compliance

The costs of complying with the law's various provisions are not exempted from the limits on expenditures. *See 2001 Guide*, *supra*. Raising contributions itself costs money and is an expenditure. *See id.* Indeed, the limits on

the size of contributions increase these fundraising costs. Moreover, for a candidate to comply with the expenditure limits, he or she must, over a two-year period, either restrict the activities of supporters and the party organization, including the driving of personal vehicles, that constitute related expenditures, or keep in constant contact with supporters and the organization to monitor the size of such expenditures. A failure either to restrict or to monitor related expenditures will create the very real risk that, at a critical stage of the campaign, several supporters or party officials will report that they have exceeded the $50 limit and have, therefore, made expenditures that must be counted as candidate expenditures and may exhaust the campaign limit. In a statewide campaign, the monitoring and limiting of related expenditures by individuals or party organizations might well require a full-time staff member.

Moreover, a candidate who does not have legal counsel and other professional services runs great risks. The ambiguities detailed above and problems of valuation will confront candidates and supporters -- or at least those who seek to comply with the law as written -- with an ongoing need for professional advice. In fact, the Secretary of State and Attorney General advise that parties and candidates retain their own separate attorneys. *See Appendix A*. As noted, the cost of these attorneys, or the value of their services if obtained as unpaid-for related expenditures by individuals or a political party, are expenditures. *See* Vt. Stat. Ann. tit. 17, § 2801(3); *infra* Part V (e).

g) Treatment of the Press

Although this legislation was fostered by groups experienced in these matters, it does not contain the usual exemption for editorials, op-ed pieces, or even letters to the editor that endorse a particular candidate. *See, e.g.*, N.Y. Elec. Law § 14-124 (exempting "any person, association or

corporation engaged in the publication or distribution of any newspaper or other publication issued at regular intervals in respect to the ordinary conduct of such business"); Conn. Gen. Stat. § 9-333w(c) (exempting "any editorial, news story, or commentary published in any newspaper, magazine or journal on its own behalf and upon its own responsibility and for which it does not charge or receive any compensation whatsoever").

Vermont's Secretary of State (the one with the photo-heavy website) has warned that if any individual or organization "requests a photograph, written presentation, or other assistance or information and informs the candidate that the requested information will be used in a publication . . . [providing such] will trigger a related expenditure." *2001 Guide*, *supra*. Therefore when: (i) a Vermont candidate meets with an editorial board, commentator, or columnist hoping for an endorsement; (ii) a supporter of the candidate uses campaign materials to author an op-ed article for a paper; (iii) a campaign official sends a letter to the editor; or (iv) a campaign official conveys information to a reporter hoping for a news story; the value of any such publication is, under Act 64, a contribution and a related expenditure. *See* Vt. Stat. Ann. tit. 17, § 2809(c). *See also infra* Part IV(d).

h) Administration and Enforcement

I turn now to the processes governing administration and enforcement of this law. Power is delegated to the Secretary of State to "adopt rules necessary to administer the provisions" regarding related expenditures. Vt. Stat. Ann. tit. 17, § 2809(f). Additionally, the Secretary of State has a general administrative role under Act 64, *see, e.g., id.* §§ 2803, 2810a, and she has actively offered her interpretations of the scope and application of the various provisions of Act 64, *see, e.g., 2001 Guide*, *supra*; *1999 Memorandum*, *supra*; *2001 Memorandum*, *supra*. As the discussion above

indicates, interpretive and valuation questions abound and, as *Appendix A* indicates, answers that are not prolix or ambiguous are often not available. Moreover, there is at present every indication that the power to "adopt rules necessary to administer" the statute will be viewed by the Secretary of State as a very broad delegation of power. *See infra* Part V(e). For example, interpreting a provision requiring that all contributions in excess of $50 be made by check, the Secretary has said that Act 64 allows so-called "pass-the-hat " fundraisers at which persons may anonymously contribute up to $50 in cash. *See 2001 Guide, supra*. Because the givers are anonymous, a candidate is not expected to monitor how many times an individual may have put $50 into ever-moving "hats" at several "pass-the-hat" fundraisers. This ruling thus promotes fundraising practices that do not really control the size of cash contributions, unless, of course, an anonymous donor foolishly drops a $100 bill into a hat.

Finally, candidates who want to seek a determination that an expenditure is a related expenditure made on behalf of their opponents may bring an expedited action in the Vermont Superior Court. *See* Vt. Stat. Ann. tit. 17, § 2809(e). Candidates wanting clarification of their own expenditures, or persons wishing to make expenditures on behalf of candidates, may request advisory opinions from the Secretary of State. *See 2001 Guide, supra*. The costs of bringing or defending such actions, or making such inquiries, are not exempted from the definition of expenditure.

IV. THE BURDEN ON PROTECTED SPEECH

a) The Burden on Grassroots Political Activity

I begin with Act 64's burdening of grassroots political activities, not only because such activities are core-

protected speech under the First Amendment -- not to say indispensable to our democracy -- but also because proponents of Act 64 purport to justify its ubiquitously restrictive provisions in the name of increasing and enhancing such activities. *See* 1997 Vt. Laws P.A. 64 (H. 28) (findings nos. 6 and 8); Trial Tr. vol. IX at 124, 131 (Elizabeth Ready). In fact, Act 64 relentlessly limits such activities and often renders them impossible. Indeed, the Act's most intrusive impact is not on the rich and powerful, who if necessary can engage in constitutionally protected independent political activity, but on the ordinary citizen, who needs to participate in organized activity to have a political voice.

As the Supreme Court noted in *Buckley*, even the humblest kind of political activity requires the expenditure of resources. *Buckley*, 424 U.S. at 19. If the law as drafted is upheld, the quality and quantity of grassroots activities will be severely diminished, although one may question whether a free people will even attempt serious compliance with a law that, were the constitutional stakes not so great, might easily be regarded as an act of legislative silliness. *See infra* Part VI(d) (failure of Act 64 supporters to comply with its reporting requirements); *infra* note 32 (reporting mileage expenses in round numbers, despite per mile valuation of 31¢); *supra* note 4 (lapel buttons and bumper stickers must identify who paid for them, the payor's address, and the candidate benefitted).

1) Burden on Volunteer Activity

As noted, Act 64 treats all related expenditures as contributions and, when they exceed $50, as expenditures by the candidate whose candidacy was supported. *See* Vt. Stat. Ann. tit . 17, § 2809(b). Related expenditures must therefore be counted in determining whether the candidate has complied with Act 64 's spending limits. Because in-kind

expenditures are included within related expenditures, any supporter engaging in the most common kind of political activities must keep detailed records over a two-year period of their value -- every mile driven, every stamp used, every use of a residence for campaign events, refreshments, pads, pencils, use of phones, etc. -- so that the total amount of such in-kind expenditures can be determined. If a supporter's related expenditures, alone or when added to monetary contributions to a candidate, reach the contribution limit, the supporter must stop all activities -- even driving to a campaign event -- or violate the law.

For example, if a supporter holds a "meet the candidate" event in his or her house, the value of the space used, possibly the costs of refreshments,[15] and the purchase of stamps and envelopes for mailing invitations to local citizens are all related expenditures. *See 1999 Memorandum, supra*. Vermont's Secretary of State has stated that it usually takes one hundred invitations to attract twenty persons to a "meet the candidate " event. *See id.* Thirty-seven dollars would thus be used for postage alone for one event for twenty people. *See United States Postal Service, First-Class Mail Rate Highlights, available at* http://www.usps.com/ratecase/first.htm. As the Secretary of State of Vermont has noted, such "meet the candidate"

[15] There is an exemption for certain expenses relating to "meet the candidate" events in Section 2809(d). *See supra* notes 12, 14. Because Section 2809(d) relates generally to activities of political parties and committees and the exemption for meet the candidate events begins with the words "In addition," the exemption may well have been intended to apply only to party- or committee-sponsored events. The Secretary of State has indicated that the Attorney General believes it to apply to all such events, however sponsored. *See 1999 Memorandum, supra*. The Secretary of State's position is unclear. In any event, the Secretary of State has opined that, even with the exemption, Act 64 unduly discourages such events because their costs involve non-exempted expenses. *See id.*

events are therefore severely limited by Act 64. *See 1999 Memorandum, supra*.

Adding to Act 64's intrusiveness on grassroots activities is its treatment of such related expenditures as expenditures by the candidate. Driving to meetings is among the most garden variety of grassroots political activities. But, under the law, a supporter who averages seven miles per month over the two-year cycle will have exceeded $50 in mileage expenses, and the candidate in question must treat that and all other resource-consuming activities by the individual as campaign expenditures.

One effect is to prevent a candidate's supporters from exercising free choice as to what activities to undertake. Because the candidate's total expenditures are limited, the activities of all supporters must be coordinated and *controlled top-down* by the candidate for two full years so that the candidate can budget a campaign and not have to end it prematurely because of belatedly discovered related expenditures in excess of $50 that exhaust the expenditure limits. Were that to happen, a candidate, or any supporter over the $50 limit, would not even be able to drive the family car to the local town green to make a speech.[16]

[16] Another common form of grassroots activity is the contribution of time and expert services by local professionals to candidates. Here, as is so often the case, Act 64 is ambiguous, but the provision of such services may well be deemed a contribution and related expenditure of some considerable size, particularly if the professional is in a firm that normally restricts the moonlighting of professional services. Indeed, to exempt professionals would be precisely counter to the purpose of reducing the influence of special interests -- *e.g.*, clients of lawyers or the lawyers themselves -- and the well-to-do.

Act 64 therefore creates great incentives for campaigns to reduce the level of grassroots activities. The danger of unexpectedly reaching the expenditure limits will require a campaign to monitor, at a cost of time and resources, those grassroots activities it allows. Fewer such activities will be allowed because of these monitoring costs and because expenditure limits require that priority be given to activities that reach the largest number of voters, such as media advertising.

2) Burden on Local Party-Funded Activity

Many grassroots political activities are sponsored and subsidized by local political party affiliates. *See* Trial Tr . vol. IX at 138-39 (Elizabeth Ready) (party helps with "grass roots organizing," "voter I.D.," and "get-out-the-vote"). Act 64 diminishes almost to the point of elimination financial support for local party activity by treating all state, county, and local party committees as a single fundraising unit for purposes of raising, and therefore spending, money. Because all contributions must go to the state party account, all expenditures by every local committee must necessarily be funded out of it. Vt. Stat. Ann. tit. 17, §§ 2801(5), 2831; *see supra* note 1. The effect is, first, to reduce severely the amount of funding for such activity -- under the limits on party related expenditures and contributions -- and, second, to force political parties into some form of top-down control -- under the single unit/single-bank-account rule for contributions to parties. *See Secretary of State Being Criticized for Fund Raising Ruling*, Associated Press, May 28, 1999 (reporting that both Republican and Democratic party leaders were shocked by the single unit rule); *supra* note 1. A town committee of a party may not even hold an organizational event with refreshments for its members without obtaining the modest funding needed from the statewide authority.

Moreover, limits on contributions and expenditures force political decisionmakers to give priority to activities that reach the largest number of voters. It is now known that Act 64 forces party committees, even without the newly-revived limits on party contributions and related expenditures, to concentrate more on mass media activities than grassroots activities. *See 2001 Memorandum, supra*; *Campaigns Meant Cash for Vermont Media*, Associated Press, Nov. 10, 2000 ("'That was one of the unintended consequences of the campaign finance law, that we saw much more spending on the media,' [Secretary of State Markowitz] said.").

b) <u>The Burden on Candidates' Speech</u>

The district court concluded that Act 64's limits on campaign expenditures are based on past experience and, with limited exceptions, are substantially the same as average expenditures by candidates in the past. *See Landell v. Sorrell*, 118 F. Supp. 2d 459, 471-72 (D. Vt. 2000). Putting aside for purposes of argument that expenditure limits are *per se* unconstitutional under *Buckley*, the level of the limits set by Act 64 clearly places unconstitutional restraints on the speech of candidates for office. First, past experience is no guide. Second, average spending in past elections is a standard that strongly favors incumbents and imposes a one-size-fits-all philosophy that severely constricts debate in the most important elections. Third, Act 64's spending levels are so low that, combined with the draconian restrictions on party spending, they will drastically reduce political debate in Vermont.

1) Past Experience

A) Inaccuracy of Reports From Past Elections

It is impossible to determine the level of *relevant* campaign spending by Vermont candidates in the past, that is, "expenditures" using Act 64's definitions. It is not altogether clear what evidence the district court specifically considered in reaching its conclusions. However, on the face of the district court's decision, it appears that the court relied heavily on testimony, some of which was conflicting, *see id.* at 470-72, and did not scrutinize in detail documentary evidence of past practices.

More significantly, even the candidate disclosure reports filed under Vermont law for past elections will vastly understate the level of spending when Act 64's two-year election cycle and its new and much broader definitions of expenditures and related expenditures are used. There are some expenditure reports in the Trial Exhibits, but they are limited to particular candidates' out-of-pocket expenditures made during a "campaign." *See, e.g.*, Trial Exs. vol. IV at E-1311 (Campaign Finance Report of Peter Brownell). Act 64's limits on expenditures, however, apply, as noted, to all expenditures made over a two-year period immediately following the last general election and ending with the next general election. *See* Vt. Stat. Ann. tit. 17, §§ 2801(9), 2805a(a).

Furthermore, under prior law, there was no provision regarding related expenditures. There was, therefore, no reason even to collect information on, much less to calculate and report, related expenditures by supporters and political parties. In particular, there was no reason to calculate the value of in-kind related expenditures by supporters, such as mileage, all of which count toward the expenditure limits under Act 64. Finally, there was also no need under prior law for candidates to segregate and calculate expenditures on their behalf by party committees, likely a huge amount. *See infra* note 19 and accompanying text. The value of such support must be treated under Act 64 as a candidate

expenditure. *See* Vt. Stat. Ann. tit. 17, § 2809(d).

We know only one thing for certain: what candidates deemed to be expenditures in the past -- generally direct cash expenditures out of a campaign's checking account -- will be vastly less than what must be so regarded under Act 64's definitions of expenditures and related expenditures.

There is another reason why prior spending is not a reliable guide for the needs of campaigns operating under Act 64. Act 64 imposes substantial costs of compliance with its terms that were not encountered under the prior law. As noted, Vermont 's Secretary of State has indicated that most candidates will be unable to proceed safely without legal advice, *see Appendix A*, and candidates running for statewide office may need the services of an accountant as well. In the case of legislative candidates, legal assistance alone could literally exhaust all the expenditures -- *e.g.* $2,000 for House candidates -- allowable under Act 64. Again, such assistance from a candidate's political party will be limited because retention of counsel by a party organization to help candidates would be a related expenditure allocable to individual campaigns.

Much time and possibly much support staff will also be consumed by the need to monitor, coordinate, and control related expenditures by supporters that must be charged to the campaign. Finally, some candidates may encounter costs in bringing and defending lawsuits concerning the myriad of interpretive questions that will arise as a result of Act 64's ambiguous provisions.

B) Inadequacy of Average Spending in Past Elections as a Constitutional Standard

The district court deemed the average campaign expenditures in past elections to be a relevant legal guide, *Landell v. Sorrell*, 118 F. Supp. 2d at 471-72, and my colleagues agree, *see* Maj. Op. at 66.

However, even if accurately determined using Act 64's definitions, the use of average expenditures in past elections inevitably yields expenditure levels that strongly favor incumbents. First, incumbent legislators in Vermont and elsewhere have ample advantages over challengers under spending limits, discussed *infra*, and therefore prefer low limits. Second, the average of past expenditures is calculated by including legislative elections that were not seriously contested or perhaps not contested at all -- elections in which little communication took place and little was spent. *See* Trial Exs. vol. III at E-0967 (appellees' expert's calculation of average expenditures, which includes low-spending candidates whose spending is unknown by assuming they spent $500, the maximum allowed before filing is required). It is altogether possible, therefore, that the average expenditure in past elections is less than the amount spent by every candidate who ran in a seriously contested race and perhaps even probable that it is less than the amount spent by any challenger who successfully challenged an incumbent.[17] Average past spending therefore has little relevance unless the goal is to disadvantage challengers.

The use of average past expenditures is inappropriate

[17] For example, the 1974 Federal Election Campaign Act, the subject of the challenge in *Buckley*, set the limits on expenditures for House of Representative candidates in general elections at $70,000. *See* 424 U.S. at 55. Adjusted for inflation, this limit was below the amount spent by every successful challenger to a House incumbent in the 1972 election. *See* Joint Appendix at 269-318, *Buckley* (Nos. 75-436 and 75-437). Nevertheless, the $70,000 limit was far above the average expenditure by House candidates in 1972, $39,884. *See id.* at 447.

for other reasons. The average will reflect only past patterns of citizen behavior in acquiring political information and prior methods of candidate communications with citizens. When citizens congregate in very large numbers for frequent community events, those events may well be effective vehicles for candidate communication with voters. When large community events become less frequent or less important in peoples' lives and voters turn to other sources to acquire political information -- some may rely heavily on a certain newspaper, some on particular radio or television stations, some on websites -- other means of communication, perhaps far more expensive, must be used by candidates for effective communication.

Part of the problem is simply the one-size-fits-all philosophy of expenditure limits. Different legislative districts may require different modes of communication. Geographic size, the existence and nature of local newspapers, radio and television stations, demographic factors, the issues, and so on, all affect the costs of communication with voters and may do so differently in many districts for the same legislative house.

Moreover, because the one-size-fits-all philosophy fails to recognize the differences between elections, it strikes at the heart of democracy. The view that there is an average election that can serve as the compulsory norm for all elections is quite dangerous, even apart from its pro-incumbent bias. Past averages have almost nothing to do with the communication needs in elections in which candidates strongly disagree over issues that divide large portions of the public and a clear-cut attempt is being made to alter government policies on those issues.

It is the non-average election that is often the historic election, one in which the outcome is heavily contested, the debate is most widespread, the public interest is at its

highest, and the most money is spent. Such an election was the New Hampshire primary of 1968, in which Eugene McCarthy, later a plaintiff in *Buckley*, badly damaged a sitting President in a debate over the Vietnam war in one of the most heavily financed primary races in history. McCarthy spent a then-unprecedented $12 per vote received in that single primary. *See* George F. Will, *Rules to Keep the Rascals In*, Newsweek, Jan. 26, 1976, at 80.

Vermont had a similar election in 2000, in which civil unions and other divisive issues were at stake. See Ellen Goodman, *Vermonters Are Caught up in a Civil War over Civil Unions*, Boston Globe, Nov. 2, 2000, at A27; Tom Puleo, *Governor's Race Tests Vermont Values; "Gay Marriage" Issue Is Monopolizing a Bitter Battle*, Hartford Courant, Oct. 30, 2000, at A1. More money was spent in the 2000 election than in any prior Vermont election. *See Lawmakers To Revisit Campaign Finance Law*, Associated Press, Nov. 14, 2000 (noting that the 2000 gubernatorial campaigns set the record for money spent); *see also* Ross Sneyd, *Campaign 2000 Involved Lots of Spending*, Associated Press, Dec. 18, 2000 (describing record spending levels for many elections across Vermont in 2000).

McCarthy's New Hampshire campaign of 1968 had national significance, while the 2000 Vermont gubernatorial election had unquestioned state, and possibly national, ramifications. Both involved unprecedented citizen participation. *See 2000 General Election Results for Gubernatorial Race*, *available at* http://cgi.sec.state.vt.us/cgi-shl/nhayer.exe ("*2000 Election Results*") (showing that voter turnout increased in Vermont by 34.5% in the 2000 election compared to previous election); Hugh Gregg, *A Tall State Revisited*, at app. (1993), *available at* http://www.politicallibrary.org/TallState/1968dem.html. And both involved, not surprisingly, unprecedented campaign spending.

C) Evidence of Contested Elections in Vermont

Campaign finance reports of Vermont candidates provide ample evidence, of which we may take judicial notice, Fed. R. Evid. 201; *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (court can take judicial notice of records filed with the SEC), that contested elections in Vermont involve spending well in excess of Act 64's limits, *even without including related individual and party expenditures*. In the last two gubernatorial elections in Vermont, the major party candidates reported expenditures in amounts that were double or almost triple Act 64's limits. *See Campaign Finance Report of Howard Dean*, Dec. 18, 2000;[18] *Campaign Finance Report of Ruth Dwyer*, Dec. 18, 2000; *Campaign Finance Report of Doug Racine*, Dec. 14, 2002; *Campaign Finance Report of Jim Douglas*, Dec. 16, 2002. Moreover, even a third party candidate for governor exceeded the limits in one election, *Campaign Finance Report of Anthony Pollina*, Dec. 18, 2000, and another third party candidate came within a whisker of the limits in the next gubernatorial election, *Campaign Finance Report of Cornelius Hogan*, Dec. 16, 2002. In the last race for Lieutenant Governor, both major party candidates and a third party candidate exceeded the limits by 63%, 40%, and 38% respectively. *See Campaign Finance Report of Peter Shumlin*, Dec. 14, 2002; *Campaign Finance Report of Brian*

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[18] When Howard Dean, the Vermont governor whose rallying cry for Act 64 is quoted in the opening paragraph of my colleagues' opinion, ran for the Democratic nomination for President, he rejected public financing so that he could spend unlimited amounts. He made that decision at a time when all of his Democratic opponents were abiding by spending limits -- *i.e.* no "arms race." Although exact numbers are not available, Dean's rivals estimated that he spent as much as $6 million in the neighboring state of New Hampshire. Mike Madden, *Democrats Scrambling For Cash As Well As Votes*, Gannett News Service, Jan. 31, 2004.

E. Dubie, Dec. 1 6, 2002; *Campaign Finance Report of Anthony Pollina*, Dec. 16, 2002.

The factual support for the conclusion reached by my colleagues -- that contested elections will not be substantially affected by Act 64's limits -- is found largely in opinion testimony offered by proponents of the Act. The already slim value of that testimony is further undermined by the fact that many of those witnesses, when they ran for office, actually exceeded Act 64's limits in contested elections, again not counting related expenditures by individuals and parties. *See Campaign Finance Report of Anthony Pollina*, Dec. 18, 2000 (spent $335,412.46 in Governor's race, with expenditure limit of $300,000); *Campaign Finance Report of Cheryl Rivers*, Dec. 18, 2000 (spent $19,290.39 in senate race, with expenditure limit of $9,000); *Campaign Finance Report of Elizabeth Ready*, Dec. 18, 2000 (spent $77,313.47 in auditor's race, with expenditure limit of $45,000, and outspent opponent by 20%, although she had testified at trial that she would abide by Act 64's limit in that race); Trial Tr. vol. IX, at 147-51 (Elizabeth Ready) (testifying that she exceeded the current expenditure limits in four of her six senate races). In the view of some of these witnesses, of course, contested elections are "arms races" that should be prohibited. *See* Trial Tr. vol. IX, at 147-151 (Elizabeth Ready). *See infra* Part V (d) (1).

2) Effect of Act 64's Expenditure Limits on Candidates

Act 64's expenditure limits will, therefore, greatly hamper Vermont candidates in getting their message to the public. The Secretary of State has noted that the expenditure limit for State Treasurer -- $45,000 -- leaves, after advertising, "no money to hire a campaign manager, do direct mail, lawn signs or bumper stickers." David Gram, *Dems Needle Each Other On Spending in Treasurer's Race*,

Associated Press, May 29, 2002. Expenditure limits should be expected to have precisely such effects because they force candidates to give exclusive priority to the methods of communication that reach the greatest number of voters.

The Secretary of State has also noted that the "tight contribution limits" of Act 64 were part of the cause of an "unprecedented amount" of independent expenditures in the 2000 Vermont election. *See 2001 Memorandum*, *supra*. As a result, candidates complained that "mailings or advertisements made on their behalf attributed to them opinions they did not hold, or sent negative messages about their opponent, in violation of their stated intent to run a positive campaign." *Id.* Expenditure limits will encourage even more extra-campaign spending and leave candidates without the means to set the record straight.

Even grassroots "meet the candidate" events in supporters' homes are severely limited, *see 1999 Memorandum*, *supra*, as noted above, and, although my colleagues mention, among other things, town barbecues and dinners as cheap but effective campaign methods, *see* Maj. Op. at 64, the nature -- when and where held and how often in the campaign season -- usefulness -- what kind of voters and in what numbers attend -- cost -- who pays -- and legal status under Act 64 -- an "expenditure" or "related expenditure" -- of these events is not elaborated in the record or discussed in my colleagues' opinion, notwithstanding the critical role such factors logically play in their opinion's analysis. In fact, these methods may be neither cheap -- at least by Act 64's meager standards -- nor effective.

There is, therefore, simply no data in the record suggesting that anything other than a drastic reduction of political speech will result from Act 64's expenditure limits. Indeed, the effect will likely be much harsher than most would expect for the reasons that follow.

First, low limits exacerbate the highly discriminatory and arbitrary effect of Act 64's selection of a two-year cycle. In a single-member Vermont House district, a candidate may spend --counting related individual and party expenditures -- only $2,000 over the two-year cycle. Vt. Stat. Ann. tit. 17, § 2805a(a)(5). A candidate who seeks to comply fully with Act 64 will be severely constricted. Any legal fees will count toward that limit. *Id.* § 2801(3). Mileage and other expenses of supporters can quickly eat up the spending allowed. A candidate who has to run in a contested primary election may well be unable to communicate with the public at all -- literally stuck in his or her driveway -- in a general election against an opponent whose campaign is just beginning.

Second, the harshness of the limits on candidate expenditures is greatly exacerbated by the fact that a candidate's campaign cannot expect the candidate's party to provide the usual supplemental support of polls, offices, computers, phones, advertisements, mailings, and other events, such as a party-funded booth at a country fair, if the conduct "primarily benefits" fewer than seven candidates. *See supra* notes 12, 14. Parties may make contributions and related expenditures benefitting candidates that total, over a two-year period, no more than $400 for each candidate for statewide office, $300 for each candidate for the Senate, and $200 for each candidate for the House. *See supra* Part III(b)-(c). In Vermont, there are six statewide offices, thirty State Senators, and 150 State Representatives. Under Act 64, a political party -- the state party and all affiliates combined -- can, over a two-year period, make a total of only $41,400 in contributions to, or related expenditures on behalf of, *all* its candidates for non-federal office.

Although *Colorado II* allows such restrictions, 533 U.S. at 465, their effect must be considered in gauging the impact of candidate expenditure limits. A statewide poll regarding candidates for the six statewide offices would cost

over $6,000. *Letter from Mark F. Michaud, Vermont Democratic Party, to Vermont Attorney General William Sorrell* 1 (Feb. 28, 2002). If the poll data were shared with the six candidates, the poll would exceed Act 64's limits ($400 by 6) by over 100%. *See Appendix A*. The full effect of Act 64's limits has, of course, not been experienced yet,[19] because the district court invalidated candidate expenditure limits and the contribution/related expenditure limits on political parties. With these limits now revived, limits on expenditures by candidates will dramatically lessen political debate in Vermont.

Finally, as noted, Act 64's one-size-fits-all approach makes no provision for candidates to adjust to economic, demographic, cultural, or technological changes that increase the costs of campaigns. Although Act 64 is premised on the view that elections are "too expensive" -- a view expressly rejected as a valid reason for expenditure limits in *Buckley*, 424 U.S. at 57 --and that candidates can make them cheaper, the "costs" of campaigning are not within the control of candidates.

The costs of resources to be used in campaigns are determined by competitive markets. Resources used in campaigns are also used, and far more extensively, for non-political communication. The prices of those resources are therefore set in markets that are independent of political campaigns and in which candidates for office must compete with non-political consumers. An inability to pay market price for communication resources will stifle political speech. Nevertheless, there is no provision for future

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[19] For example, in the 2000 election, the Democratic Party made cash contributions -- *not including related expenditures* -- in the amount of $28,000 to Elizabeth Ready for her campaign for Auditor of Accounts. *See Campaign Finance Report of Elizabeth Ready*, Dec. 18, 2000. Under Act 64, cash contributions *and* related expenditures could not have exceeded $400.

inflation in Act 64's limits, although even slight annual increases in the consumer price index will in a few short years substantially reduce further the ability of candidates to communicate with voters. For example, the cost of postage stamps is now higher than when Act 64 was passed. *See It Now Costs 3 Cents More to Mail a First-Class Letter*, N.Y. Times, June 30, 2002, at 18. For another example, the price of gasoline has risen considerably since then. (The reimbursement rate for mileage driven by federal employees has been increased from 31¢ at the time of Act 64's passage to 37½¢ in July, 2004. *See* U.S. General Services Administration, *Privately Owned Vehicle Reimbursement Rates*, at http://www.gsa.gov (effective Jan. 1, 2004).)

As noted above, the effect of rising costs has already been observed by Vermont's Secretary of State. With regard to a campaign for State Treasurer -- with an expenditure limit of $45,000 -- she noted that, "The cost of paid media has changed quite a bit in the last four or five years. With prices for television ads, and even radio ads, running a campaign on $45,000 will leave you no money to hire a campaign manager, do direct mail, lawn signs or bumper stickers." David Gram, *Dems Needle Each Other on Spending in Treasurer's Race*, Associated Press, May 29, 2002. It goes without saying that there also would be no room under the spending cap for grassroots activities that would have to be included as related expenditures.

Act 64 also does not take into account the fact that a combination of demographic, cultural and technological changes may require resort to ever more costly methods of communication. Campaigns may communicate with voters only by going to where voters are or using a medium watched or listened to by voters. My colleagues assume the existence of numerous public events in which large groups of voters frequently congregate and can be personally addressed. *See* Maj. Op. at 64. However, voters are not

required to abide by such assumptions and to congregate in great numbers at scheduled times during political campaigns or even to welcome an interruption of free time at home by a candidate's personal visit. Rather, they may prefer to get their information through technology that puts candidates at the mercy of a competitive market and technological advances.

For example, because the development of cable television broadened viewership opportunities for the public, it also required candidates who wished to communicate through television to buy ads on many, instead of a few, channels. For another example, the development of the Internet has made it possible for candidates to offer websites to provide information to potential voters, a fantasy fifteen years ago. The Executive Director of the Vermont Democratic Party has opined that a candidate website is now "a necessity." Nancy Remsen, *Election Notebook 2002*, Burlington Free Press, Sept. 9, 2002, at 1B.

Act 64 takes a Luddite view of political communication --one witness for the defense even suggested the bicycle as a means of travel in campaigns, Trial Tr. vol. IX, at 134 (Elizabeth Ready) -- and prevents candidates from adjusting to new demographic and cultural patterns and costs, even though the Supreme Court has expressly declared that government is not to make that choice. *See Meyer*, 486 U.S. at 424; *Buckley*, 424 U.S. at 57.

c) The Burden on Challengers

The fact that limits on candidate expenditures tend to disadvantage challengers in campaigns against incumbents is recognized both in the provisions of Act 64 -- which has slightly lower limits for incumbents -- and in its legislative history. *See, e.g., Hearing on H. 28 Before the Vt. House*

Comm. on Local Gov't, 64th Biennial Sess. (1997) (statement of Rep. Terry Bouricius); *Hearing on H. 28 Before the Senate Comm. on Gov 't Operations*, 64th Biennial Sess. (1997) (statements of Sens. Seth Bongartz and Jean Ankeney). The Supreme Court has also noted that limits on candidate expenditures may "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *Buckley*, 424 U.S. at 57.

Incumbents in effect have capital -- name recognition, an existing organization, tested donor lists, etc. -- to draw upon without making expenditures as defined in Act 64, while virtually every significant capital-building activity by newcomers requires the use of resources that count toward the expenditure limits. Equally important is the fact that incumbents have methods of getting their name before the public that are not limited by Act 64, while challengers do not.

To take an example from Vermont, the State Treasurer, an elected official, publishes newspaper ads at state expense listing names of Vermonters who may have funds in dormant bank accounts, unclaimed insurance refunds, or unclaimed stock dividends. These ads have contained photos of the incumbent Treasurer and have run in the October of election years. In 2001, the ad read, "Jim Thompson, Vermont state treasurer, may have money for you." *Treasurer .Candidates Show Signs of Restraint*, Burlington Free Press, Sept. 23, 2002, at 1B. To take another Vermont example, whereas a challenger to an incumbent Secretary of State can obtain a Madison Avenue-type website only by spending money counted as an expenditure, the incumbent can use state funds for such a site, and post on it materials casting a favorable light on the incumbent, omitting only the words "Vote for me." *See Vermont Secretary of State's Website*, at http://www.sec.state.vt.us; *Office of the Attorney General Website*, at

http://www.atg.vt.us; *see also supra* Part III(c). Moreover, the Secretary's political party provides visitors to its site a link to the Secretary's site. *See supra* Part III(c).

The term "arms race" has acquired an almost talismanic quality in the course of this litigation, serving as a quip that answers every concern about Act 64's effect on political speech. In fact, however, slogans about stopping the "arms race" are often cover for the disarming of challengers. *See infra* Part V(d).

For example, one of the witnesses whose testimony is relied upon heavily by my colleagues, Maj. Op. at 40-41, 42, 50, 51, 58-59, 65 is a very successful electoral official in Vermont who testified to the "arms race" at the State Senate level, Trial Tr. vol. IX, at 147, 150 (Elizabeth Ready). As an incumbent and undoubtedly well-meaning supporter of Act 64's limits, which she had exceeded (not including related individual and party expenditures) in most of her (always successful) campaigns, *see id.* at 147, *supra* Part IV(b)(1)(C), she testified that she had been forced to make larger expenditures because her opponents ran advertisements and posted yard signs that gained the attention of voters. She was then compelled to do the same, instead of relying on her preferred campaign method of person-to-person contact, because voters seeing her opponents' ads and yard signs wondered whether she was running for reelection. *See id.* at 147-48. In her view, the "arms race" forcing her to run ads and post yard signs should be stopped.

So used, "arms race" is a pejorative term that refers to contested elections in which challengers spend resources to run serious campaigns. Incumbents do not restrain their own acquisition and use of perquisites of office that help them win reelection, but these perquisites are never mentioned as part of the "arms race." For example, the

witness described above, who offered yard signs as evidence of an "arms race," now holds the elected post of State Auditor with a website that has her photo and various pages listing her goals and accomplishments. *Office of the Vermont State Auditor Website*, at http://www.state.vt.us/sao. To boot, the Vermont Democratic Party website offers visitors a link to the Auditor Website. *See supra* Part III(c). Expenditure limits therefore stop "arms races" by challengers, leaving incumbents with ample weapons.

Moreover, Act 64's selection of the two-year cycle as the governing time period collapses primary and general elections under one expenditure limit and will in the main favor incumbents, who face serious primary challengers less frequently than those seeking a party nomination to challenge an incumbent. Indeed, there appears to be little other reason justifying the choice of the two-year cycle.

The degree of the adverse effect of Act 64 on challengers will depend in large part on discretionary, arbitrary, and often *ad hoc* rulings on what kinds of activities and speech by incumbents will be deemed to be official communication by officeholders to the public and what kinds will be deemed to be campaign expenditures. Of course, virtually every activity by an incumbent officeholder intending to seek reelection will have a political effect, and such officeholders will to one degree or another take that effect into account in determining their behavior. The law provides for marginally lower limits on expenditures by incumbents, but this largely inconsequential difference will be rendered irrelevant so long as the substantial communications by incumbents are not deemed campaign expenditures. Conversely, the advantage of incumbents under the Act's limits will also depend on what activities by non-announced challengers are deemed to be by a "candidate" and "for the purpose of influencing an election." *See generally* Vt. Stat. Ann. tit. 17, § 2801(1), (3).

These issues, of course, will likely be addressed in the first instance by an incumbent official, the Secretary of State. *See 2001 Guide, supra*; *see also infra* Part V(e). Should these rulings be adverse to incumbents -- a not very likely scenario --the incumbents can overturn them by legislation. If the rulings favor incumbents, challengers have no such option.

Because the hands-off approach of my colleagues accords expansive deference to legislative judgments as to expenditure limits, *see* Maj. Op. at 36 & n.9, incumbents are given a weapon that can be manipulated as needed in the future. Should the limits of Act 64 prove inadequate and the "arms race" continue to result in ads and yard signs by challengers, they can be altered at will.[20]

Act 64's major factual premise is that Vermont incumbents so crave reelection that they ignore official duties and personal honor to that end. My colleagues abandon this premise in reassuring us that self-interest will not influence campaign finance regulation despite the considerable evidence that self-interest contributed, albeit

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[20] A low level of judicial scrutiny necessarily leaves legislators with discretion to alter campaign finance regulations to affect upcoming elections. We have seen an example of this in New Jersey, where a campaign finance law was deliberately changed in an (unsuccessful) attempt to bolster the candidacy of a new entrant into the race for Governor. *See* David M. Halbfinger, *Substitute Candidate, on Short Notice, Stakes Claim in Race for New Jersey Governor*, N.Y. Times, Apr. 27, 2001, at B5; David M. Halbfinger, *New Jersey Legislature Votes To Delay Primaries 3 Weeks*, N.Y. Times, Apr. 24, 2001, at B5. In Vermont, Governor Dean sought to use money reserved for the public financing of campaigns -- a key part of Act 64 -- to pay general state expenditures. *See State May Tap Campaign Finance Fund to Ease Budget Crunch*, Associated Press, Dec. 5, 2001.

below the public radar, to the level of expenditure limits set by Act 64 and to adoption of the two-year cycle.

Moreover, there is powerful evidence that self-interest will prevail. Incumbent legislators can exercise a direct influence on the outcome of elections in two ways: campaign finance regulation and reapportionment. The importance of self-interest is dramatically confirmed by the effect of legislative reapportionment on election districts for the United States House of Representatives, an area in which courts have deferred to legislative judgment. *See White v. Weiser*, 412 U.S. 783, 794-95 (1973) ("From the beginning, we have recognized that reapportionment is primarily a matter for legislative consideration and determination.") (internal citation omitted); *see also Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). Reapportionment of federal House districts now has one and only one guiding star: incumbent protection. *See* John Harwood, *No Contests: House Incumbents Tap Census, Software to Get a Lock on Seats*, Wall St. J., June 19, 2002, at A1 ("Thanks to the play-it-safe strategies of Republicans and Democrats alike, and to the sophisticated technology now used in redistricting, competition is being squeezed out of the House -- with huge consequences."); *id.* (describing the practice of "sweetheart " gerrymandering by incumbents of both parties); Richard Perez-Pena, *With 2 Congressional Seats Lost, Albany Begins Battling Over Who Must Go*, N.Y. Times, Jan. 22, 2002, at B1 . These sources demonstrate that reapportionment is now widely regarded as little but the "rigging" of elections in the name of the special interest -- incumbency -- that dominates legislative decisions. I know of no reason why the guiding star in reapportionment decisions will not become the guiding star in campaign finance regulation.

d) <u>The Burden on the Press</u>

As noted, the law does not exempt the media from the definitions of "contribution," "expenditure," or "related expenditure." Media support is a "thing of value" that, if "facilitated" or "solicited" by a candidate, would be a "related expenditure." *See* Vt. Stat. Ann. tit. 17, §§ 2801(3), 2809(c); *see also 2001 Guide*, *supra*. Indeed, as noted above, Vermont's Secretary of State has warned candidates that providing a photo, written materials, or "other assistance or information" to anyone for use in a publication will trigger a related expenditure. *See id.*

The extent of the burden imposed on the press by Act 64 is potentially vast, again depending largely on discretionary rulings by those who must administer Act 64. *See infra* Part V(e). Certainly, editorials or op-ed endorsement(s) of candidates fall directly within Act 64's language, as would publication of letters to the editor from a candidate, a campaign official, or even a supporter. One witness relied upon in my colleagues' opinion testified that she authored articles on issues for the press as a no-cost campaign tactic, Trial Tr. vol . IX, at 135 (Elizabeth Ready), but publication of these articles would clearly fall within the related expenditure language of Act 64. Media sponsorship of debates might also, particularly if some candidates were excluded or if some did not want to appear. Ordinary news stories about campaign events brought to a newspaper's attention by a candidate or campaign official, or even news reports on interviews with candidates, also fall squarely within the ruling by the Secretary of State described above. *See 2001 Guide*, *supra*.

None of this is inconsistent with Act 64's underlying philosophy. The theory underlying Act 64 would easily include the media as a powerful special interest having a stake in government action just like any other profit-making business or organized economic interest -- *e.g.*, the newspaper quoted by my colleagues is part of a huge multi-

national organization, undoubtedly one of the larger companies doing business in Vermont. *See Gannett Co. Inc. Operations*, *available at* http://www.gannett.com/map/units.pdf (listing The Burlington Free Press as a subsidiary). A candidate enjoying the editorial support of the local press, favorable coverage of his or her campaign events, and publication of his or her op-ed articles receives benefits bestowed at considerable expense, including past capital investment and current spending. Unless expenditure limits include the value of media support, an opponent who does not enjoy such support *and* labors under an expenditure limit exempting media support is in a real sense facing a candidate who is allowed to spend more because of a powerful economic supporter. Of course, unconstitutional restraints on the press are not validated by a need for fairness created by unconstitutional restraints on political candidates. *See infra* note 21.

However, many proposals to regulate campaign finance exempt the media, *see*, *e.g.*, N.Y. Elec. Law § 14-124; Conn. Gen. Stat. § 9-333w(c), often including a definition of what organs of communication constitute exempted media, *see e.g.*, Bipartisan Campaign Reform Act of 2002, § 201(f)(3)(B), Pub. L. No. 107-155, 116 Stat. 81 (codified at 2 U.S.C. § 431 et seq.).[21] Nevertheless, Act 64

[21] Some may doubt that Act 64 was intended to apply to media editorializing because they deem such editorializing to be constitutionally protected. However, paid advertisements have the same protection as editorials, *see Sullivan*, 376 U.S. at 266 (holding that "statements [that] would otherwise be constitutionally protected . . . do not forfeit that protection because they were published in the form of a paid advertisement"), and if government may constitutionally limit paid advertisements, as Act 64 does, government may limit unpaid endorsements. I, of course, believe that government cannot limit either.

The reason many campaign finance laws exempt the media is, therefore, not constitutional scruple, but the desire of proponents of regulation for media exposure and support. Such support might not be forthcoming if

does not contain such an exception. Given the plain language of Act 64 and the consistency of its theory with that language, Act 64 can fairly be said to burden the press, and any candidate who seeks its support, quite as much as the Act burdens other candidates and their supporters.

e) The Burden on Party Affiliates

As noted, Act 64 treats a contribution to a state, county or local party affiliate as a contribution to all affiliates, and requires that all such monies be deposited in a single bank account. *See* Vt. Stat. Ann. tit. 17, §§ 2801(5), 2831; *see also supra* note 1.

My colleagues note that "the local and state affiliates will now have to record and coordinate their contributions," but reassure us that "the provision does not impose any organizational burden on the party outside of the campaign finance realm, and requires no broader organizational reform." Maj. Op. at 88. Of course, under Act 64, the "campaign finance realm" is not some incidental, out-of-the-way matter but covers virtually every organizational activity, including even the cost of charcoal, hotdogs, hamburgers, and soft drinks for a town committee picnic. Moreover, the "record[ing] and coordina[tion]" is required to be done through a single bank account. *See* Vt. Stat. Ann. tit. 17, §§ 2801(5), 2831; *supra*, note 1. If a party town committee wants $50 for a picnic, it must petition the state party official authorized to sign checks from the statewide account to obtain the only money that can legally pay for those items. Local party-funded booths at country fairs were mentioned

the media realized the extent to which the theory of such laws is a dagger easily aimed at freedom of the press.

as a person-to-person method of campaigning by one witness relied upon by my colleagues, *see* Trial Tr. vol. IX, at 138 (Elizabeth Ready), but such funding must also come from the statewide account.

By requiring that the recording and coordination of all party financing be done through a statewide party organization that parcels out funds, Act 64 not only disrupts but revolutionizes the organization of American political parties and their critical role in a free society. The centralizing of party funding will of course make all grassroots political activities by local party affiliates -- the indispensable stuff of American politics -- subject to the whim of state party officials. In fact, when the Vermont Secretary of State ruled that a contribution to one party organization constituted a contribution to all affiliates, both Republican and Democratic state leaders registered shock -- another example of the lack of scrutiny given the actual provisions of Act 64 -- and opined that grassroots activities would be severely inhibited. *See Secretary of State Being Criticized for Fund Raising Ruling*, Associated Press, May 28, 1999 (noting one political operative's stunned response as being "Someone's totally taken leave of their senses").

V. THE CONSTITUTIONAL RESOLUTION

Some of Act 64's severe limitations on political advocacy are unconstitutional because no governmental interest, much less a compelling interest, has been offered to justify them. These include the two-year cycle for limits on contributions and expenditures, *see* Vt. Stat. Ann. tit. 17 §§ 2801(a), 2805(a), 2805a(a), the forced centralization of local party affiliates, *see id.* §§ 2801(5), 2831, and the imposition of expenditure limits on candidates' self-funded campaigns, *see generally id.* § 2805a(a).

Even if expenditure limits may be constitutionally enacted notwithstanding *Buckley's* holding to the contrary, Act 64's limits are so low that they are unconstitutional by any reasonable test. Indeed, they survive in the present case only by my colleagues' creation of a standard that allows legislatures to adopt low, incumbent-protecting limits.

With regard to the governmental interests asserted as justifications for Act 64,[22] my colleagues rely upon two in particular: government's interests in eliminating corruption or the appearance thereof and in affording candidates more time to spend with non-donor voters. *See* Maj. Op. at 53-55. As discussed in my colleagues' opinion, however, these interests are broadly defined and include eliminating special access or the appearance of special access of donors to officeholders, reducing the influential or agenda-setting effect of "bundled" contributions, and increasing citizen confidence in the electoral process. *See id.* at 38-55; *see also* 1997 Vt. Laws P.A. 64 (H. 28). All of these interests were rejected by the Supreme Court in *Buckley*, 424 U.S. at 25-26, but, even if they had not been, they have not been demonstrated in the present case as having a constitutionally sufficient nexus to the limits on candidate expenditures and related expenditures.

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[22] My colleagues note that one purpose of Act 64's expenditure limits was to reduce the use of short commercials by candidates but, in light of their disposition of this matter, do not reach the issue of whether this concern is sufficiently compelling to justify the legislation. In that regard, I note two things. First, that interest is not compelling. Indeed, the use of law to force candidates to select one medium of advocacy rather than another is an unconstitutional purpose limits down. *See Meyer*, [individuals'] right not and an additional ground for striking expenditure 486 U.S. at 424 ("The First Amendment protects only to advocate their cause but also to select what they believe to be the most effective means for so doing."). Second, Act 64 has increased reliance on the media. *See 2001 Memorandum, supra*; David Gram, *Dems Needle Each Other on Spending in Treasurer's Race*, Associated Press, May 29, 2002.

a) Restrictions on Political Activity for Which No Governmental Interests are Asserted

As to some of the restrictions on political activity imposed by Act 64, no governmental interest whatsoever has been proffered as a justification. Absent the assertion of a justifying governmental interest, any significant restraint on political speech should be struck down as *per se* unconstitutional. *See* Eu, 489 U.S. at 222 ("If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest.")

First, no reason is offered for the adoption of the arbitrary and highly discriminatory two-year cycle for limiting contributions and expenditures. *See* Vt. Stat. Ann. tit. 17, §§ 2801(9), 2805(a), 2805a(a). A two-year cycle does not reduce the influence or access to officeholders of special interests, reduce time pressures on candidates, or increase citizen or voter confidence in government. Act 64's public financing provisions recognize the self-evident need for greater financing on the part of those who must run two campaigns rather than one. *See id.* §§ 2855(a), (b). Collapsing primary and general elections under a single expenditure limit is thus a flat-out suppression of speech for no asserted reason, save perhaps for the unspoken reason of incumbent protection, as discussed *supra.*

Similarly, no justification or governmental interest is offered for Act 64's treatment of a contribution to any party affiliate as a contribution to all affiliates, with the statutory requirement that all contributions to, and thus, expenditures by, all party affiliates -- state and local -- be from a single bank account. *See id.* §§ 2801(5), 2831; *supra* note 1. Because Act 64 limits contributions to, and related expenditures on behalf of, particular candidates by political parties on an aggregated basis, contributions to separate

affiliates cannot serve as a conduit allowing individuals to evade the limits on single source contributions. *See Colorado II*, 533 U.S. at 464-65 (permitting restriction of coordinated party expenditures to minimize circumvention of contribution limits). Neither the interests in eliminating corruption, saving candidates' time, nor increasing confidence in government are therefore served by aggregating contributions to affiliates of political parties.

While serving none of Act 64's asserted goals, the aggregated treatment of contributions to affiliates eliminates the right of local committees to be free from centralized control in raising funds for local party-building activities. One of the most vital and fertile areas of democratic political activity in America is the local party committee, which, while loosely related to larger party organizations, is the source of grassroots activities that permit citizens to participate and seek change. Local party activities are a critical means by which a changing public opinion is absorbed gradually into the political system, rather than going unheard until it reaches explosive force. Because these activities require funding, Act 64 directly impairs them. *See Secretary of State Being Criticized for Fund Raising Ruling*, Associated Press, May 28, 1999 (noting that leaders of both parties warn that "the ruling would have the effect of undermining the goal of Vermont's new campaign finance law to encourage more grassroots political activity"). *See supra* Part IV (a).

Freedom of association includes the right not only to engage in group activities but also to affiliate groups with one another, on a horizontal, vertical, or hierarchical basis, loosely or with centralized control. The choice is to be made by the citizens involved, not by government. *See Timmons*, 520 U.S. at 358; *Meyer*, 486 U.S. at 424; *Buckley*, 424 U.S. at 57.

Finally, no reason is given for applying expenditure limits to candidates who desire to fund their own campaigns. *See generally* Vt. Stat. Ann. tit. 17, § 2805a(a). Such candidates already have "access" to themselves and need not spend excessive time fund-raising. Again, speech is suppressed for no reason. *See Buckley*, 424 U.S. at 44-45.

b) *Buckley* Forecloses the Asserted Justifications for Expenditure Limits

Turning to the reasons given by my colleagues as constitutional justifications for expenditure limits, each of them has already been considered and rejected by the Supreme Court. *Buckley* rejected in the most explicit terms the notion that government may, under a Constitution containing the First Amendment, limit the amount of political speech by candidates and ordinary citizens. *See id.* It is no surprise that many of the arguments made in favor of Act 64 rehash those considered in *Buckley* because Act 64 was intended by its proponents as a vehicle to overturn the *Buckley* ruling. *See 2001 Memorandum*, *supra*; *Hearing on H. 28 Before the Vt. House Comm. on Local Gov't*, 64th Biennial Sess. (1997) (statement of Anthony Pollina); *Hearing on H. 28 Before the Vt. Senate Comm. on Gov't Operations*, 64th Biennial Sess. (1997) (statement of Sen. William Doyle); Vt. House Comm. of Conf., *Report on Campaign Finance*, H. 28, 64th Biennial Sess. (1997).

For example, the question of special donor access or the appearance thereof was highlighted both by the Congress that enacted the expenditure limitations struck down in *Buckley*, *see Minority Views on Report of the Comm. on House Admin. to Accompany H.R. 16090* (July 30, 1974), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 749 (1977), and by the Court of Appeals for the District of Columbia, which upheld those limitations and was reversed in *Buckley*.

Buckley v. Valeo, 519 F.2d 821, 838 (D.C. Cir. 1975), *aff'd in part* and *rev'd in part*, 424 U.S. 1 (1976). That court expressly noted that "[l]arge contributions are intended to, and do, gain access to the elected official," *id.*, an observation interchangeable with language in my colleagues' opinion. To be sure, the Supreme Court did not use the word "access" in *Buckley*, but it did use the stronger term, "improper influence." *Buckley*, 424 U.S. at 27, 45-46. Having held that corruption itself or the appearance thereof -- bribes -- was not sufficiently compelling to justify limits on expenditures by candidates, *id.* at 55, the Court hardly had to go on to say that access or the appearance of access -- returning or taking a phone call from a donor -- was also not compelling. Reducing bribes is generally regarded as a far more compelling interest than reducing phone calls.

It is also suggested that the practice of bundling contributions by those with common interests justifies expenditure limits. My colleagues assume that the practice of bundling was unknown at the time of *Buckley*. Maj. Op. at 43.[23] However, the concept of pooling contributions by

[23] My colleagues cite a Sixth Circuit concurrence for the proposition that *Buckley* was "'decided on a slender factual record,'" Maj. Op. at 27 (citing *Kruse v. City of Cincinnati*, 142 F.3d 904, 919 (6th Cir. 1998) (Cohn, J., concurring)). To this they add citations to a treatise, a law review article, and a student note for the proposition that *Buckley* was decided without a "factual" record. The authors of these works could not have been familiar with the actual record before the Court in *Buckley*, which contained over 700 pages of statistical and testimonial data and findings of fact, as described below. Those materials are a matter of public record, and the *Buckley* briefs and oral arguments can be found in a published, two-volume work. *1976 Landmark Briefs and Arguments of the Supreme Court of the United States: Buckley v. Valeo* (Phillip B. Kurland and Gerhard Casper, eds. 1977) (hereinafter "*Landmark Briefs*").

Buckley involved a major piece of legislation passed after extensive congressional hearings in which critics of the private financing of elections supported their case with massive submissions of evidence.

Legislative History of Federal Election Campaign Act Amendments of 1974, The Federal Election Commission (1977). The Supreme Court's decision indicated familiarity with this body of evidence. *See, e.g.*, *Buckley*, 424 U.S. at 20 nn. 20-21 (giving election-related statistics); *id.* at 22 n.23 (same); *id.* at 26 n.27 (same). Other materials before the Supreme Court in *Buckley* include, *inter alia*, a Joint Appendix of 762 pages, which compiled findings of fact and statistical findings agreed to by the parties, Joint Appendix at 4-698, *Buckley* (Nos. 75-436 and 75-437), and the district court's findings of fact, *id.* at 699-753.

The agreed upon findings of fact included data from opinion polls on public perceptions of politicians, political participation, expenditure limits, and cynicism about government, *id.* at 160-89, 207-53, detailed catalogs of specific contributions by labor unions, PACs, and business organizations to individual candidates, *id.* at 55-146, data on expenditures in presidential elections from 1912 to 1968 indicating increasing spending and an increasing cost per vote, *id.* at 50-51, the cost of postage and newspaper advertising, *id.* at 29-32, advantages of incumbents over challengers, *id.* at 16-24, statistics indicating declining voter participation, *id.* at 9, evidence that candidates generally focused on wealthy donors but that candidates who limited their expenditures had been successful in the past, *id.* at 256-59, and evidence that elected officials give preferential access to large contributors, *id.* at 256-57.

The agreed upon statistical findings included data on and analysis of contributions to, expenditures by, and election results for, all congressional candidates and political committees that filed reports in the 1972 and 1974 elections, *id.* at 270-440, 571-72, 619-78, votes received by challengers versus incumbents in the 1974 House races, *id.* at 679-96, evidence of specific individuals and groups donating money to congressional candidates on committees relevant to their businesses, *id.* at 462-64, 467-72, statistics on independent expenditures, *id.* at 472-73, data on individuals who contributed large sums to 1972 congressional elections and the Committee to Reelect the President, *id.* at 479-564, a detailed analysis of the 1972 elections which discussed, among other things, the costs of raising money from large versus small donors and the relationship of expenditures to success in elections, *id.* at 571-586, and a ten volume study by Common Cause entitled *1972 Congressional Campaign Finances*, *id.* at 698.

The *Buckley* district court's findings of fact were based on the testimony and affidavits of fifteen individuals, and basically summarized that testimony. *Id.* at 699. These findings included opinions on the

persons with common interests is hardly new. Indeed, at the time of *Buckley*, proponents of the 1974 Act relied heavily on pooled contributions by various firms in particular industries as evidence of improper influence. *See Senate Floor Debates on S. 3044* (Mar. 28, 1974, Apr. 3, 1974) (statements of Sens. Griffin, Baker), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 259, 365-66 (1977); *House Floor Debates on H.R. 16090* (Aug. 8, 1974) (statement of Rep. Dickinson), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 917 (1977). An amendment in the House that would have prohibited pooling was introduced, voted on, and rejected. *See Minority Views on Report of the Comm. on House Admin. to Accompany H.R. 16090* (July 30, 1974), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 752-53 (1977); *House Floor Debates on H.R. 16090* (Aug. 7, 1974), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 858-59 (1977).

This was all explicitly before the Supreme Court in *Buckley*. In fact, "bundling" was considered so significant

importance of seed money to challengers, *id.* at 703, 714, the ways in which expenditure limits favor incumbents over challengers and third party candidates, *id.* at 727-33, 713-19, indices of success other than winning or losing, *id.* at 712, and the ability to run a successful campaign with little money, *id.*

In *Buckley*, therefore, the Court had before it extensive hard data regarding contributions to, and expenditures by, candidates for federal offices, as well as a multitude of reflections and opinions on the role of money in campaigns by persons familiar with American electoral politics. Moreover, the defense in *Buckley* included not only the government but also various groups, including Common Cause and the League of Women Voters, who were allowed to intervene as full parties and were represented by the Washington law firm, Wilmer, Cutler, and Pickering and by Archibald Cox of the Harvard Law School, a former Solicitor General of the United States.

that the findings of the *Buckley* district court as to large contributions cataloged them by industry as well as by individual donor. *See* Joint Appendix at 86-143, *Buckley* (Nos. 75-436 and 75-437). In particular, much attention was given at the time of *Buckley* to the 1972 campaign contributions by the dairy industry, in which milk producers pooled a large sum and then broke it down into contributions by small committees to avoid disclosure. *See Senate Floor Debates on S. 3044* (Mar. 26, 1974, Mar. 27, 1974, Mar. 28, 1974, Apr. 3, 1974, Apr. 4, 1974) (statements of Sens. Hathaway, Griffin, Hollings, Baker, Kennedy), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974*, at 205, 225, 257, 365, 376-77 (1977). This incident was a highly publicized scandal at the time. It was featured in the Court of Appeals decision that upheld expenditure limits, *Buckley*, 519 F.2d at 839 n.36, and that was reversed by the Supreme Court, *Buckley*, 424 U.S. at 55. Finally, an example of "bundling" was mentioned during the oral argument in the Supreme Court in *Buckley*. *1976 Landmark Briefs and Arguments of the Supreme Court of the United States: 2 Buckley v. Valeo* 729 (Phillip B. Kurland and Gerhard Casper, eds. 1977) (appellees' argument that disclosure of small contributions necessary because of "the problem of culminating, of combining contributions, if you have a large number of people who are affiliated"). The term "bundling" may be new, therefore, but the concept is long in the tooth.

My colleagues now emphasize a governmental interest mentioned only in passing in their original opinion, the belief that expenditure limits will reduce the time spent fundraising by candidates, with the hope that the extra time will be spent conferring with ordinary citizens. Maj. Op. at 45-55. This justification overlaps with the access issue and, to that extent, was decided in *Buckley* as discussed above.

In any event, the arguments regarding the time politicians spend fundraising were, as conceded by my colleagues, known and made before the Supreme Court in *Buckley*. Because my colleagues quote a commentator for the proposition that in *Buckley*, "'candidate time protection was almost wholly ignored as a justification for campaign spending limits,'" Maj. Op. at 47 (quoting Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1285-86 & n.15 (1994)), I quote the pertinent passages from the briefs and lower court decision in the margin. The time-protection argument was relied upon by the Court of Appeals in *Buckley* in upholding the statute, [24] was the subject of an entire subsection of the brief filed in the Supreme Court on behalf of the Attorney General and Solicitor General,[25] was

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[24] *See Buckley v. Valeo*, 519 F.2d 821, 838 (D.C. Cir. 1975). The Court of Appeals found that:

> In practice . . . candidates were compelled to allot to fund raising increasing and extreme amounts of time and energy. Senator Hollings testified that survival required candidates for national office to "set down a policy where they won't go see people other than those who can give money." Joseph Cole, finance chairman for the Democratic National Committee, testified from his experience in some four or five Presidential campaigns, how dog-tired candidates must arise early in pursuit of large contributions, and continue "all day long and all night long." "[How] much time do you think a Presidential candidate spends on fund raising? . . . at least 70 percent of his time, and I think all of his waking hours. It is really demeaning, demeaning to go through it."

Id. (footnotes omitted).

[25] *See Landmark Briefs: 2 Buckley v. Valeo* (Brief for the Attorney General as Appellee and for the United States as Amicus Curiae). The relevant section of the brief stated:

argued as a justification in the brief filed in the Supreme Court by intervening parties defending expenditure limits,[26]

> Fund raising consumes candidate time that otherwise would be devoted to campaigning.
>
> The court of appeals found support for the statute in the fact that in order to raise large amounts of money to support a campaign, "candidates [are] compelled to allot to fund raising increasing and extreme amounts of time and energy." A past finance chairman of the Democratic National Committee testified that a presidential candidate is required to spend 70 percent of his time in pursuit of funds.
>
> There is, of course, another side to this problem. If the idea is that expenditure limits relieve the pressure of raising funds, thereby giving the candidate more time to engage in speaking, there may be effective alternative means of accomplishing this end. For example, public financing of election campaigns, quite independent of restrictions upon contributions and expenditures, will provide some relief. A restriction on contributions will increase this effect even without an accompanying restriction on expenditures; once candidates are precluded from drawing upon wealthy donors who command personal attention, campaign fund raising may turn more to direct mail efforts that are sparing of the candidate's time.

Id. at 434-35 (internal citations and footnotes omitted).

[26] *See Landmark Briefs: 2 Buckley v. Valeo* (Brief for Appellee Center for Public Financing of Elections, Common Cause, League of Voters, et al.). The brief stated:

> Th[e] rising thirst for money has forced candidates to divert time and energy to fund-raising activities and away from other activities, such as addressing the substantive issues, that do not fill campaign coffers. Joseph Cole, who was National Finance Chairman of the Democratic National Committee, vividly recounted

and was mentioned by the Supreme Court itself.[27] The claim that this issue was not fully before the Court in *Buckley* is therefore incorrect.

> the effects of the pressure to raise money on candidates in a passage quoted by the court of appeals:
>
> > ". . . I have been close to four or five Presidential campaigns . . . . I have sat next to the Presidential candidate, who was tired, who was weary and concerned with the issues and not able to handle them, not able to prepare, not able to think about them because he has to go downstairs at 7 in the morning to shake hands with a guy from whom he may get a large contribution."
> >
> > "It goes on all day long and all night long, and I was asked at the Senate hearings how much time do you think a Presidential candidate spends on fundraising? And I said at least 70 percent of his time, and I think all of his time, and I think all of his waking hours. It is really demeaning, demeaning to go through it."

Id. at 97 (footnotes omitted); *see also* Landmark Briefs: *2 Buckley v. Valeo*, (Brief of Senators Hugh Scott and Edward M. Kennedy as *Amici Curiae*) ("The pressure upon candidates to raise money from large contributors had become so great as to leave them little time for ordinary citizens.") (footnote omitted).

[27] *See Buckley v. Valeo*, 424 U.S. at 91 ("In this case, Congress was legislating for the 'general welfare' . . . to free candidates from the rigors of fundraisers"); id. at 96 ("In addition, the limits on contributions necessarily increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions."); S. Rep. 93-689, 5 (cited in above quotations from Buckley, and justifying public financing because "[m]odern campaigns are increasingly expensive and the necessary fundraising is a great drain on the time and energies of the candidates"); see also Buckley, 474 U.S. at 258-59 (White, J., concurring in part and dissenting from the Court's

c) The Insufficiency of the Governmental Interests

Even putting aside *Buckley's* binding precedent, the various interests asserted in defense of expenditure limits fail to satisfy First Amendment requirements.

1) Anti-Corruption

Act 64 drastically reduced the limits on contributions established in prior Vermont law. There is no evidence in the record that Act 64's new low limits on contributions alone will not suffice to eliminate any improper influence. All of the --largely sparse, anecdotal, and conclusory -- evidence of improper influence dates from a time when the contribution limits were much higher.

Prior Vermont law allowed contributions of $1000 per election to any candidate. *See* Vt. Stat. Ann. tit. 17, § 2805(a) (1996) (amended 1997). As noted, Act 64 limits contributions to candidates for statewide office to $400, for the state senate to $300, and for the state house to $200. *See* Vt. Stat. Ann. tit. 17, § 2805(a). The reduction is greater than might be perceived because Act 64's contribution limits apply over a two-year cycle and related individual and party expenditures -- *e.g.*, mileage, house parties -- must be counted in determining whether a donor has reached the limit. *See id.* § 2801(a), 2805(a), 2805a(a), 2809(a); *see also supra* Part III(b)-(e).

In assessing the anti-corruption effect of expenditure limits, my colleagues rely on a portrait of Vermont politics

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view that the expenditure limits were unconstitutional) ("In another major innovation, aimed at insulating candidates from the time consuming and entangling task of raising huge sums of money, provision was made for public financing of political campaigns for federal office.").

drawn from testimony by a handful of proponents of Act 64. That portrait is essentially as follows. The money spent on campaigns has been spiraling over the forty or more years in which Vermont has toyed with expenditure limits. *See* 1997 Vt. Laws P.A. 64 (H. 28) (finding no. 1); Maj. Op. at 12-14, 49-53. The urge to raise campaign money has increased accordingly, *see id.* at 49-53, leading to an "arms race" caused by the fear of being "vastly outspent," *id.* at 58, in which, because one candidate may, for example, buy materials for yard signs, others must do so also, *see* Trial Tr. vol. IX, at 148 (Elizabeth Ready). We are also told that candidates for legislative office have historically spent less in their campaigns than the limits set by Act 64. *See* Maj. Op. at 63-64. In concrete terms, this means that the average campaign cost, the "arms race," for single-member Vermont House or Senate races has over 40 years spiraled to $2,000 and $4,000 respectively. *See generally* Vt. Stat. Ann. tit. 17, §§ 2805a(a)(4), (a)(5).

We are also told that raising these sums creates such a dependence among legislators on large contributors -- at the time, a $1,000 maximum -- that for the entire two years after each election, the legislators engage in "perpetual fundraising," Maj. Op. at 7, and have little time to talk with ordinary citizens. *See id.* at 49-52. The selections from the testimony highlighted in my colleagues' opinion portray members of the Vermont legislature as susceptible to corruption and so obsessed with soliciting or conferring with cash donors that they have very little time to confer with ordinary citizens. *See* Maj. Op. at 50-54 (describing candidates as being "locked away" while fundraising instead of "out with the public" because "candidate time is effectively for sale").

The record justifying Act 64's massive regulation of political speech is not strong; in fact, it is pitifully weak. Even if Vermont legislative candidates had to raise cash

amounts well in excess of $4,000, this task would hardly leave them so obsessively dependent on large contributions (now a maximum over a two-year cycle of $400, $300, $200, depending on office), *see* Vt. Stat. Ann. tit. 17, § 2805(a), that large contributors would thereafter be able to demand the right to most of the legislators' free time. What little actual evidence there is to the contrary is on its face gross hyperbole. For example, the testimony of a person described by my colleagues as a "lobbyist," who offered descriptions of Governor Dean meeting only with contributors, Trial Tr. vol. IX at 195-96 (Anthony Pollina), is heavily relied upon in their opinion, Maj. Op. at 50, 52, 53. In fact, that person was a lobbyist for the passage of Act 64, whose success in that regard -- with the Governor's support – entirely belies his assertions about elected officials listening only to large contributors.

There are also, of course, the accusations of corruption with precisely the same scripted sound-bites that are used in every talk-show discussion of these issues. In fact, my colleagues' opinion overstates this testimony by omitting important qualifications offered by the witnesses relied upon, such as their lack of knowledge of any legislative vote ever cast solely because of a campaign contribution, Trial Tr. vol. VII at 48-49 (Toby Young); Trial Tr. vol. VII at 105 (Cheryl Rivers) ("I am not talking about selling votes."), their denial of present improper influence in contrast to their fear of future behavior *under the old contribution limits*, Trial Tr. vol. VII at 37 (Toby Young) (opining that Vermont elections are clean); *id.* at 50 (opining that an official would grant preferential access to a *thousand-dollar* donor); Trial Tr. vol. VII at 137-38 (Cheryl Rivers) ("I don't think the present situation is good, and I think if we don't do something, it's going to get worse."); Trial Tr. vol. IX at 167-69 (Elizabeth Ready) (accepting *$1000* and *$2000* contributions appeared improper though she was not influenced), and their knowledge of the ready access of

ordinary citizens to lawmakers, Trial Tr. vol. VII at 27-28 (Toby Young) (stating that typical state public officials in Vermont will see anyone who wants to see them).

The only particularized evidence of improper influence relied upon by my colleagues consists of one anecdote. It involved "widely reported" meetings of major dairy companies with unnamed officials when such meetings were denied to smaller dairy organizations, Maj. Op. at 50. We are asked to assume in this case that unspecified contributions -- in contrast to, perhaps, numbers of voters involved -- were the decisive factor. Moreover, not only are the details of this episode unknown, but it also took place before Act 64's limits on contributions. It is therefore not particularly relevant.

In any event, the First Amendment does not permit the suppression of speech based on such untested anecdotal evidence. *See,e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 820-21 (2000) (requiring more than "anecdotal evidence" of "signal bleed" problem in support of a regulation requiring broadcasters to fully scramble sexually-oriented programming); *Stanley v. Georgia*, 394 U.S. 557, 567 (1969) ("Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.").

Moreover, if the claims of widespread, improper influence are true, anecdotes should not be the only available evidence. Disclosure of contributions has been required in Vermont for years, offering documentary support for the claims, if accurate, of dependence on large or bundled contributions and of the influence of those contributions. *See*, e.g., Vt. Stat. Ann. tit. 17, §§ 2811(a)(1)-(4) (effective

July 1, 1982) (amended 1997) (requiring campaign reports for candidates' contributions and expenditures). The lack of reference to available hard evidence of who gave what to whom even under the prior higher contribution limits suggests that the portrait of corruption painted by my colleagues is vastly overdrawn.

When the Supreme Court decided *Buckley*, it had before it detailed records of actual large, bundled contributions and the amount of out-of-pocket expenditures by candidates.[28] *See*, *e.g.*, *Buckley*, 424 U.S. at 32-34 & nn. 35-40; Joint Appendix at 264, 483, *Buckley* (Nos. 75-436 and 75-437); *see also supra* note 22. Nevertheless, it struck down the expenditure limits as facially unconstitutional. *See Buckley*, 424 U.S. at 54-55. Here, the opposite result is

[28] For example, the Court of Appeals in *Buckley* stated:

> Looming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports. The industry pledged $2,000,000 to the 1972 campaign, a pledge known to various White House officials, with President Nixon informed directly by Charles Colson in September 1970, as acknowledged by the 1974 White House paper . . . . On March 23, 1971, after a meeting with dairy organization representatives, President Nixon decided to overrule the decision of the Secretary of Agriculture and to increase price supports. In the meetings and calls that immediately followed the internal White House discussion and preceded the public announcement two days later, culminating in a meeting held by Herbert Kalmbach at the direction of John Ehrlichman, the dairymen were informed of the likelihood of an imminent increase and of the desire that they reaffirm their $2 million pledge.

519 F.2d at 840 n.36.

reached based on anecdotal evidence, even though better evidence, if corruption exists, is available.[29]

[29] My colleagues suggest in a footnote citing to *McConnell*, see Maj. Op. at 42, n.12, that speech may be suppressed based solely on anecdotal evidence, and that reliance on a couple of untested and untestable anecdotes from Act 64's supporters is sufficient. However, *McConnell* -- which dealt with contributions, not expenditures -- does not stand for any such proposition. *McConnell* explained specifically how "[t]he evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." 124 S.Ct. at 664 (citing among other sources the declaration of former Senator Alan Simpson that "Donations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform"). *McConnell* also noted that

> The evidence in the record shows that candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries. . . . federal officeholders have commonly asked donors to make soft-money donations to national and state committees "solely in order to assist federal campaigns," including the officeholder's own. Parties kept tallies of the amounts of soft money raised by each officeholder, and "the amount of money a Member of Congress raise[d] for the national political committees often affect[ed] the amount the committees g[a]ve to assist the Member's campaign." Donors often asked that their contributions be credited to particular candidates, and the parties obliged, irrespective of whether the funds were hard or soft. National party committees often teamed with individual candidates' campaign committees to create joint fundraising committees, which enabled the candidates to take advantage of the party's higher contribution limits while still allowing donors to give to their preferred candidate. Even when not participating directly in the fundraising, federal officeholders were well aware of the identities of the donors: National party committees would distribute

> lists of potential or actual donors, or donors themselves would report their generosity to officeholders.

Id. at 662-63 (quoting and citing statements by politicians, CEOs and lobbyists).

To support their argument that anecdotal evidence may, by itself, serve to repress speech, my colleagues parse *McConnell*'s statement that "The record in this case is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 664, see Maj. Op. at 42 n.12. In fact, this statement does not reference a record "replete" with anecdotal evidence, as my colleagues seem to believe, but introduces a factual discussion: So pervasive is this practice that the six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access. For example, the DCCC offers a range of donor options, starting with the $10,000-per-year Business Forum program, and going up to the $100,000-per-year National Finance Board program. The latter entitles the donor to bimonthly conference calls with the Democratic House leadership and chair of the DCCC, complimentary invitations to all DCCC fundraising events, two private dinners with the Democratic House leadership and ranking members, and two retreats with the Democratic House leader and DCCC chair in Telluride, Colorado, and Hyannisport, Massachusetts. Similarly, "the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors." *Id.* at 665 (noting parenthetically "records indicating that DNC offered meetings with President in return for large donations").

For their part, lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials. *Id.* at 662-63 (quoting and citing statements by politicians, CEOs and lobbyists).

To support their argument that anecdotal evidence may, by itself, serve to repress speech, my colleagues parse *McConnell*'s statement that "The record in this case is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." *Id.* at 664, see Maj. Op. at 42 n.12. In fact, this statement does not reference a record "replete" with

2) Time Protection

I turn now to the claim that expenditure limits are necessary because "endless fundraising[] drastically reduces opportunities that candidates have to meet with non-contributing citizens." Maj. Op. at 50. As noted, this argument was squarely before the Supreme Court in *Buckley*. *See supra* notes 24-27. It was, understandably, given only passing attention by the Court because it is not compelling in any sense. The time protection argument, baldly stated, is

anecdotal evidence, as my colleagues seem to believe, but introduces a factual discussion:

> So pervasive is this practice that the six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access. For example, the DCCC offers a range of donor options, starting with the $10,000-per-year Business Forum program, and going up to the $100,000-per-year National Finance Board program. The latter entitles the donor to bimonthly conference calls with the Democratic House leadership and chair of the DCCC, complimentary invitations to all DCCC fundraising events, two private dinners with the Democratic House leadership and ranking members, and two retreats with the Democratic House leader and DCCC chair in Telluride, Colorado, and Hyannisport, Massachusetts. Similarly, "the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors."

Id. at 665 (noting parenthetically "records indicating that DNC offered meetings with President in return for large donations").

that law can force candidates to engage in more personal communications with voters by limiting candidate spending on other means of communication.

The evidence in the record of excessive time consumption reveals that it is not a testable proposition but can be repeatedly stated as fact and in exaggerated terms. There is no doubt that candidate time is spent fundraising and that some of it is wearisome. However, there is also no doubt that one can say that candidates spend too much time fundraising without knowing how much time is actually spent, because no one else knows either. This particular record contains almost no evidence of the specific time spent fundraising. To the extent that a particular amount of time was described, it was brief, such as an afternoon. Trial Tr. vol. IX at 151 (Elizabeth Ready) ("That afternoon that I had to raise that extra money, I wasn't in front of the Grand Union nor was I going door to door.").

Time protection is a useful political argument for a number of additional reasons. It allows legislative proponents of expenditure limits to avoid saying that limits are needed because they themselves might be tempted to vote for or against a measure solely to get a campaign contribution. Instead, they can say, without fear of any future verification, that they need more time to spend with "ordinary citizens."

The time protection argument is also useful because it can easily be exaggerated. There is often no dividing line between donors and "ordinary citizens" who support a candidate or between fundraising and other campaign events. Meetings with supportive voters can often be described either as "fundraising" or as "person-to-person contact with voters," depending on the point to be made. The type of campaign events at which money is raised might well be held even if no contributions were sought. After all, even a

holiday dinner with family members can be described as being "locked away" with large donors. *See* Vt. Stat. Ann . tit. 17, § 2805(f) (contributions by candidates and their immediate families unlimited).

In a more sinister vein, time protection is a particularly useful argument for incumbents. It is on its face either a remarkable example of incumbent self-sacrifice or a remarkable example of self-interest. Should we believe that incumbent legislators, who generally can raise campaign money more easily than non-incumbents, want major-party and third-party challengers to spend less time fundraising so that the challengers can spend more time engaged in supposedly more effective personal meetings with ordinary citizens? Or, is it possible that incumbents may want to stress the value of person-to-person contact over other methods of communication with voters, knowing that those other methods of communication with voters will still be substantially available to incumbents even under expenditure limits while not -- or much less -- available to potential challengers. For incumbents, the time protection argument is less about increasing person-to-person contact with voters than it is about limiting their opponents' overall contact with voters. Time protection and incumbent protection thus usefully coincide. Finally, person-to-person contact between candidates and voters will not increase under an incumbent-rigged system. Potential challengers will be deterred from running, and incumbents who will be protected by the law's expenditure limits will have less need for person-to-person contact.

Governmental interests that are so speculative -- or incumbent protective -- are not sufficient to override significant First Amendment interests. *E.g.*, *Stanley*, 394 U.S. at 567.

In any event, Act 64 actually diverts candidates from

meeting with voters. As my colleagues concede, limiting the size of individual contributions necessarily increases the amount of time that must be spent raising a particular amount of money. Maj. Op. at 52. Moreover, expenditure limits also impose time consuming tasks on candidates themselves, particularly because expenditure limits may preclude the hiring of staff. As noted, expenditure limits require candidates to map-out, monitor, and put values on activities by supporters or party organizations that involve related expenditures, which, if they exceed $50 with regard to a single source, must be totaled within the permissible expenditure and contribution limits. *See* Vt. Stat. Ann. tit. 17, § 2809(a)-(c); *see also supra* Part III(e). Every campaign event involving supporters -- *e.g.*_buying yard signs and driving to where they will be placed, holding meetings or dinners -- must involve close calculations by candidates as to whether the particular activities constitute expenditures or related expenditures and what value should be attributed to particular in-kind expenditures. Act 64's provisions will actually force candidates to spend more time than ever on non-speech-related activities.

3) Public Confidence in Government

This brings me to the argument of Act 64's proponents that the expenditure limits of Act 64 will restore public confidence in government and thereby increase citizen and voter participation in elections. Of course, every attempt to suppress speech is based on claims that the speech in question, if allowed to go on freely, will induce behavior that is undesirable. Critics of literature, theater, or television with explicitly sexual or violent themes claim that such speech may induce the behavior portrayed. *See, e.g.*, 1 American Psychological Association, *Report of the American Psychological Association Commission on Violence and Youth*, at 6 (1992), *available at* http://www.apa.org/pi/pii/violenceandyouth.pdf (stating that exposure to violence in

mass media increases the risk of youth involvement in violence). Those who would censor political speech will always argue that such speech will reduce confidence in government. I have no doubt that supporters of the Alien and Sedition Acts made such arguments and that many incumbent officeholders view vigorous opponents as undermining confidence in government.

Governmental suppression of speech must be based on a compelling demonstration that the speech will incite conduct --here an alleged indifference to politics on the part of citizens -- that government has a right to prevent. *See Boos v. Barry*, 485 U.S. 312, 335 (1988) (Brennan, J., concurring in part and concurring in the judgment) ("Our traditional analysis rejects such *a priori* categorical judgments based on the content of speech, requiring governments to regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce those effects.") (internal citations omitted); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."). I do not doubt that government can and ought to take steps to enhance citizen confidence, but suppressing political activity will not encourage either more confidence or more political activity.

In fact, no little part of the public confidence argument is a quintessential self-fulfilling prophesy. The confidence of Vermont citizens in their state government is unlikely to be substantially enhanced so long as Act 64's proponents make unsupported claims about the corrupt nature of that government.

In any event, an indifference to politics cannot be traced to excessive spending for electoral purposes. To the

contrary, the New Hampshire 1968 primary and the Vermont 2000 election involved heavy citizen participation because of voter interest in the issues and the critical fact that candidates who were divided on those issues could raise and spend money debating them. The theory of Act 64, as stated in the legislative findings, is that public involvement decreases as spending increases. *See* 1997 Vt. Laws P.A. 64 (H. 28) (findings nos. 4 and 10). However, record amounts were spent on the Vermont 2000 gubernatorial election, *see* Ross Sneyd, *Campaign 2000 Involved Lots of Spending*, Associated Press, Dec. 18, 2000, but a full -- perhaps also record breaking -- 34.5% more people voted in the 2000 election than in the prior gubernatorial election. *See 2000 Election Results*, *supra*.

Nor is there experience elsewhere to the contrary. Before 1976, presidential general elections were privately funded with no limits on contributions and expenditures. Claims of a lack of citizen confidence were made. From 1976 through 1988 -- before the era in which so-called soft money played a growing role --presidential general elections were fully funded by government and subject to expenditure limitations. No appreciable increase in turnout or confidence in government was noted.

As in the one-size-fits all concept of an average election, there is much in the public confidence argument to fear. Proponents of Act 64 rely upon evidence such as a poll showing that 75% of voters believe that large corporations have too much influence and on a newspaper article (published by a very large corporation) stating similar conclusions. If polls suggesting that citizens believe that some groups have too much power demonstrate a governmental interest sufficient to silence those groups, political speech, including freedom of the press, cannot be protected.

Act 64 reduces the contribution limits for statewide races to $400, Senate races to $300, and House races $200. *See* Vt. Stat. Ann. tit. 17, § 2805(a). There is nothing in the record of this case to suggest that these limits are not sufficiently low to dispel any possibility of corruption or the appearance of corruption, at least as viewed by reasonable persons. *See Buckley*, 424 U.S. at 55 (holding that "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions," and therefore does not justify campaign expenditure limitations). The proponents of Act 64 mention only hypothesized, large, cash contributions as leading to an improper influence on government. There is no evidence whatsoever that expenditures by supporters for "meet the candidate" events, or that supporters' use of a residence, computer or phone, purchase of stamps, or driving to meetings have ever caused a problem that calls for redress.

Moreover, there is nothing in the record to suggest that disclosure of amounts and sources of a candidate's campaign funds, in conjunction with low contribution limits and/or a form of public financing, is not the proper democratic method of enhancing voters' confidence in the character of the people they elect. Nor is there anything in the record to suggest that a reduction of campaign activity, in particular grassroots activity, will lead to persons of better character being elected, particularly under the terms of a law enacted by those of purported lesser character.

The theory of Act 64 is that less political advocacy is better for us as a polity because too much political activity is engaged in by powerful groups. Because these groups are theoretically able to use every means of communication as a conduit of influence, political activity at every level must be reduced. Act 64 is, therefore, designed to impose relative silence on everyone, with two exceptions. First, incumbents will ensure that they can communicate with the public.

Second, the truly rich and powerful can still engage in constitutionally protected independent political activities or buy a media outlet. Expenditure limits do not limit the influence of a Richard Mellon Scaife, a George Soros, or the politically concerned persons that publish the Washington Post, New York Times, National Review, and New Republic. Candidate expenditure limits in fact enhance the power of these wealthy individuals to set the political agenda while the ordinary citizen -- who must speak, if at all, through organizational activity -- is silenced.

d) Stopping the "Arms Race," "Effective Advocacy," and Incumbent Protection

As noted, the term "arms race" has been much used in this litigation, *see*, *e.g.*, Appellants' Br. at 26-27; Maj. Op. at 42, 44, 49, 51, 58, 59, 68, 72; Trial Tr. vol. VIII at 57 (Peter Smith); Trial Tr. vol. VII at 56 (Cheryl Rivers), but in a way that suggests that it is so obviously an appropriate analogy that an explanation of its relevance is unnecessary. When examined, however, the analogy has no logical or factual support. It is also antithetical to the First Amendment because it suggests that government may set a low maximum limit on political speech and, to boot, one that is particularly harmful to challengers.

1) The "Arms Race"

The "arms race" analogy is a useful -- and therefore oft-used -- political slogan for proponents of Act 64 because it suggests subliminally a catastrophic spectre of millions being killed and perhaps elimination of the species itself. However, the analogy between nuclear-tipped ICBM's -- which many people would want to eliminate completely -- and political advertisements -- in Vermont, yard signs -- is not one that meets the straight-face test, much less one that

fits well within First Amendment jurisprudence, and this aspect of the analogy is unworthy of further discussion.

What other lessons the slogan "arms race" is deemed to further are difficult to detect because it is used as an argument-stopper rather than argument-advancer. It may suggest that much of political spending is superfluous -- beyond a certain point additional spending does not change votes. This is a suggestion that posits candidates who keep spending even though it will not benefit them. If so, the empirical basis for that suggestion is not visible in this record. Nor is there a visible basis for believing that the particular point at which further persuasion stops is the low expenditure limits imposed by Act 64.

Perhaps the implication is that spending becomes superfluous at some point but candidates have no idea where that point is and continue to spend anyway. However, if the critical point cannot be determined by a candidate in a particular campaign, it certainly cannot be determined on a one-size-fits-all basis by a self-interested legislature or by a reviewing court.

My colleagues apparently do not use "arms race" to imply superfluous spending. Rather, they perceive the "race" to result from the fear of being "vastly outspent" by better financed opponents. Maj. Op. at 58. They do not deny that on election night, election officials do not count the dollars spent by a candidate to determine the winner, and thus, that a fear of being outspent necessarily associates spending with voter persuasion. *See id.* at 52 (quoting Act 64 supporter for proposition that contribution limits without expenditure limits would lead to competitions "to see who could raise the most money and outspend their opponent and *therefore* win the race") (emphasis added). "Arms race" is therefore a pejorative method of describing competition over voter persuasion, the very heart of the democratic process.

The proponents of Act 64, like my colleagues, also use the slogan "arms race" to argue that any such race should be prevented because, in their view, (supposedly) low cost, person-to-person contacts are the most effective campaign tactics. Trial Tr. vol. IX at 143, 150 (Elizabeth Ready) (personal contact more effective than paid media); Trial Tr. vol. VII at 100 (Cheryl Rivers) (challenger spending more than incumbent is not serious detriment to incumbent, who "can make it up with grass roots effort"). Therefore, campaign expenditures above a certain level (somehow determined) can be eliminated without disadvantaging any candidate.

What is not explained, however, is why, if spending above that somehow determined level is ineffective, such spending by a candidate is feared by the candidate's opponent. The answer must be, and is, that the additional spending does persuade voters. As the incumbent Senator, whose testimony is relied upon by my colleagues, testified, she had to spend more than she wished because her opponents' ads and yard signs caused voters to wonder whether she was running for reelection. Trial Tr. vol. IX at 148 (Elizabeth Ready) ("[W]hen everybody has yard signs out and everybody's on the radio and the TV, your constituents will say, Aren't you running Elizabeth? I see that so and so has got a million yard signs out. You don't have any yard signs.") Her opponents, in short, had gotten the attention of voters, who appear to have been more oblivious to her person-to-person campaign than she would have liked. In fact, as used in the present record, "arms race" is a term by which incumbents describe contested elections.

2) "Effective Advocacy"

I turn now to the test adopted by my colleagues to determine whether the level of expenditure limits set by Act 64 is unconstitutional. That test asks whether the limit is so

low that it prevents "effective advocacy" by "driv[ing] the sound of a candidate's voice below the level of notice." Maj. Op. at 62-63 (internal citation omitted). Two aspects of this test must be emphasized. First, it is a minimum speech test, expressly authorizing government to silence candidates once they reach "the level of notice" (assuming no less restrictive methods are available). Second, my colleagues, by equating (understated) average past expenditures with the threshold "level of notice, " *id.*, further reduce the minimum at which government can silence candidates, *see supra* Part IV(b)(1).

Despite the unconditional statements by the Supreme Court that contribution limits "'entai[l] only a marginal restriction upon the contributor's ability to engage in free communication,'" *McConnell*, 124 S. Ct. at 655 (quoting *Buckley*, 424 U.S. at 20), while "limitations on expenditures [are] direct restraints on speech," *id.* at 647, my colleagues take the "effective advocacy"/"level of notice" standard from a discussion of contribution limits in *Shrink*, 528 U.S. at 395-96, and force it into the quite different context of expenditure limits.

Contributions pose the spectre of improper influence and may be substantially limited. *Colorado II*, 533 U.S. at 440-41 ("limits on contributions are more clearly justified by a link to political corruption than limits on other kinds of political spending are"). The language taken by my colleagues from *Shrink* says no more than that, even given the governmental interest in reducing improper influence, contribution limits may not be set so low as to prevent an otherwise viable candidate with large numbers of potential small donors from raising enough money even to be noticed by voters. 528 U.S. at 395-96. It does not say that such a candidate may, having raised a substantial amount in small contributions, be prevented from spending more than what (government believes) is needed to reach the minimum level of notice. Indeed, *Shrink* itself repeatedly and conspicuously

emphasized the constitutional distinction between contribution limits and expenditure limits. 528 U.S. at 386 ("expenditure limits [are] direct restraints on speech, which nonetheless suffer[] little direct effect from contribution limits"); *id.* at 387 (noting a "similar difference between expenditure and contribution limitations in their impacts on the association right"); *id.* ("restrictions on contributions require less compelling justification than restrictions on independent spending") (internal citation omitted). This distinction was recently reaffirmed by the Court in *McConnell*, 124 S. Ct. at 655 (reaffirming practice of "subject[ing] restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions" because "contribution limits, unlike limits on expenditures, entail only a marginal restriction on the contributor's ability to engage in free communication").

Unlike expenditure limits, which directly restrain speech, *Buckley* made clear that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." 424 U.S. at 21. "A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication . . . [because] the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

It is from this premise -- as long as the candidate can speak effectively, the contributor also can speak -- that the effective advocacy test was born. *See also McConnell*, 124 S. Ct. at 655-56 ("Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to prevent candidates and political committees

from amassing the resources necessary for effective advocacy.") (internal quotation marks and alteration omitted). In no way do the cases evaluating contribution limits use the effective advocacy test to restrain the direct political speech occasioned by expenditures.

Were these cases read otherwise, they would represent a complete abandonment of the First Amendment's standard of a free, robust discussion in which citizens "retain control over the quantity and range of debate on public issues in a political campaign," even when those who control the government believe the spending to be "wasteful, excessive, or unwise." *Buckley*, 42 4 U.S. at 57. That test, which emphasizes freedom, would be replaced by a test that permits government to cap the amount of permissible speech.

3) Incumbent Protection

The rhetoric of the "effective advocacy"/"level of notice "standard based on average past expenditures conceals a legal test lethal to challengers. A "level of notice" is something that incumbents generally have and challengers generally lack. Under my colleagues' test, therefore, an incumbent's campaign starts at the "level of notice" at which a challenger's campaign may be stopped by government. This anti-challenger effect is aggravated by the use of average past expenditures to determine the "level of notice." *See* Maj. Op. at 62-63. As detailed above, *see supra* Part IV(b)(1), past averages, even if accurately calculated -- a result not attainable given Act 64's new definitions -- include uncontested, or barely contested, elections. *See* Trial Exs. vol. III at E-0967 (appellees' expert's calculation of average expenditures, which includes low-spending candidates whose spending is unknown by assuming they spent $500, the maximum allowed before filing is required); *id.* at E-1019 (appellees' expert's report criticizing appellants' expert for failing to include low-spending candidates, whose

spending is unknown, in his averages of campaign expenditures).

e) The Excessive Discretion Accorded Administrators

In their first opinion, my colleagues, noting that "[i]t is beyond cavil that an opponent of the Act will argue its ambiguities and statutory peculiarities," addressed the merits of that argument and stated that the discretion accorded administrators by Act 64 was not constitutionally excessive . *Landell v. Sorrell*, slip op. at 9156 (withdrawn). They now argue that the issue need not be addressed. Maj. Op. at 75, n.26. I disagree.

The discretion issue is clearly before us. The degree to which Act 64 limits political activity is the first part of the calculus that is before the court. The second part of the calculus is the sufficiency of the reasons proffered in its support. Where only acts of administrative or judicial discretion can mitigate the harshness of restrictions on protected activity so as to render the justifications for the restrictions constitutionally sufficient, the constitutionality of that discretion itself is obviously put in issue.

Mild or incidental restrictions on political activity require less compelling justifications than do harsh restrictions. *FEC v. Beaumont*, 123 S. Ct. 2200, 2210 (2003)(level of scrutiny applied to "political financial restrictions" is "based on the importance of the political activity at issue to effective speech or political association") (internal citation omitted). Much of what Act 64 says harshly limits political activity; much else is left to future elaboration. Perhaps we may rely upon the wisdom of Vermont's Secretaries of State, Attorneys General, and its courts, to mitigate the harsh effects of Act 64's language and to resolve its pervasive ambiguities in favor of freedom,

rather than suppression, of political speech. If so, the reasons offered in support of the Act might seem sufficient. However, mitigating rules -- *e.g.* reducing the effect on the press or allowing local party affiliates self-financing -- would involve wholly discretionary or arbitrary decisions, and the very existence of that discretion is itself a constitutional problem that cannot be avoided.

Limits on campaign expenditures are like all limits on speech. If the limits are triggered, further speech is forbidden. It is standard First Amendment jurisprudence that such a restriction on speech must be precisely crafted to avoid vesting those who administer the law with excessive discretion as to its interpretation. *See Forsyth*, 505 U.S. at 131 (requiring "narrow, objective, and definite standards"). The requirement that a law regulating speech embody workable and known standards is necessary both to alert those who are regulated to its terms, *see Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991) (requiring regulation of speech to give "fair notice" to those to whom it is directed), and to prevent enforcers from making decisions based on impermissible grounds, *see id.* at 1050-51 ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement."); *Forsyth*, 505 U.S. at 131 (noting "danger of censorship" where regulation allows excessive enforcement discretion).

Act 64 simply lacks discernible criteria for the many interpretive and valuation questions that it creates. If there is to be compliance with Act 64 -- instead of candidates and their supporters generally ignoring it as a silly law -- there must be constant interpretation by the Secretary of State, the Attorney General, and the Vermont courts with regard to the vast number of questions that will arise election-by-election, campaign-by-campaign, and day-by-day. The answers to those questions are the equivalent of granting or denying a

permit to speak. In interpreting the statute, however, the Secretary of State and the Vermont courts are afforded almost no guidance except for the manipulable proposition that the influence of "special interests" is to be reduced and that of "ordinary citizens" increased.

For example, the statute says nothing about the payment of debts or wind-down expenses of prior campaigns during the next two-year cycle. *See 1999 Memorandum, supra*. It is also unclear whether the (paltry) exception for expenses for "meet the candidate" events applies only to party-sponsored events or all such affairs. *See supra* notes 14-15; *see generally* Vt. Stat. Ann. tit. 17, §§ 2809(d) (1) - (3).

If Act 64 is enforced, valuation questions regarding the donation or use "of anything of value" will themselves be a constant issue. When the Act was passed, the Secretary of State set the cost at 31¢. Although travel on behalf of a candidate's campaign is a related expenditure counting toward the contribution limit, *see* Vt. Stat. Ann. tit. 17, § 2809(c), she has arbitrarily not changed that figure notwithstanding the substantially increased price of gas and the pervasive availability of public and private mileage guidelines. In fact, employees of the State of Vermont are compensated at 37½¢ per mile at present. Vermont Dept. of Personnel, *Collective Bargaining Agreements*, at http://www.vermontpersonnel.org/employee/labor_cba.cfm (effective July 1, 2003 to June 30, 2005) (setting mileage reimbursement for Vermont employees at level established by the U.S. General Services Administration, currently 37½¢). Given the two-year cycle and the low contribution/related expenditure limits, mileage valuations are of enormous importance, but those valuations appear essentially to be matters of caprice under Act 64.

There will also be ubiquitous questions concerning whether particular activities of officeholders, "candidates,"

or would-be "candidates" have "the purpose of influencing an election." *See generally* Vt. Stat. Ann. tit. 17, § 2801. Indeed, the Supreme Court stated in *Buckley* that the last-quoted phrase was unconstitutionally vague unless more narrowly confined than it is in Act 64. *See supra* note 6. There is also little guidance as to what conduct is an "affirmative action to become a candidate," *see supra* notes 9-10, or what professional services are donations or related expenditures by a firm rather than volunteer services. *See id.* §§ 2801(1), 2809.

Furthermore, the definition of "related expenditures" can provoke thousands of questions regarding actions of individuals or political parties as to which the answer turns -- after a potentially intrusive inquiry into the fine details of what candidates and political parties want to do or did, what they said, and what they thought -- on what was the "primary thrust" of the activity. *See Appendix A.* In addressing such questions, the Secretary herself has noted that the likelihood of so many different factual circumstances arising prevents the drafting of precise rules regarding whether particular efforts by a party will be related expenditures on behalf of candidates -- one of the most important questions arising under Act 64. *See id.*

All of these issues are serious, bristling with First Amendment implications, and their resolution will ofttimes award an election to one candidate rather than another. If a party's poll is deemed a related expenditure on behalf of a candidate for the House, most or all of that candidate's expenditure limits for two elections may be exhausted. If a particular activity by an incumbent legislator is deemed an expenditure, rather than the performance of an official duty, that legislator may be barred from driving the family automobile to the local town green to make a speech during the campaign. If the activity is not an expenditure, the incumbent legislator may be allowed to engage freely in very

helpful electoral activities that are denied to his or her opponent. If a candidate has a supporter who is a lawyer and whose professional services are not deemed related expenditures, that candidate will have a great advantage over another whose supporters are not lawyers, including the ability to bring litigation against the opponent that will exhaust the opponent's campaign funds. A ruling allowing lawyers to contribute professional services without counting such services as contributions or related expenditures is hardly out of the question under Act 64, even though lawyers are not less apt than other citizens to seek favors from elected officials for themselves or their clients.

The Secretary of State's opinions allowing partners to make double donations -- once by the partnership, once by the individual partners -- and endorsing the legality of "pass-the-hat" fundraisers in which donors are allowed to remain anonymous and on the honor system as to how much they give are only the first examples of how Act 64 will come to mean what the Secretary of State and Vermont courts say it means. *See 2001 Guide*, *supra*. Mileage is now computed at 31¢ no matter what the price of gas. *See 2001 Memorandum*, *supra*. Such uncabined discretion cannot be squared with the First Amendment's requirements that speech be regulated according to spelled out and precise criteria.

Equally important, such discretion cannot be squared with increasing confidence in government, which, in enforcing Act 64 against those running for government office, will necessarily appear inefficient and arbitrary. Only an organ of government can administer and interpret these laws. However, that interpretation consumes time when time is of the essence[30] --*Appendix A* is a letter dated December 3,

[30] In the last mayoral election in New York City, a candidate claimed to be eligible for public financing in a primary race, but his application was denied in a debatable ruling. *See* Mirta Ojito, *Badillo Campaign Denied*

1999, responding to an inquiry dated October 8 -- and is susceptible to colorable claims of partisan influence.

In Vermont, the purported author of Act 64 was denied public financing because his party took a poll that, if attributed to his candidacy, would be a related expenditure causing him to exceed the maximum contribution and expenditure limits for candidates eligible for public financing. *See* Ross Sneyd, *Progressives' Poll Raises Question About Public Financing*, Associated Press, Feb. 21, 2002 (describing Anthony Pollina's violation of the campaign finance law). The Democratic party then objected to his receipt of public financing. *See* Ross Sneyd, *Democrats Ask that Pollina Be Disqualified from Public Financing*, Associated Press, Feb. 28, 2002. The Secretary of State and the Attorney General, both Democrats, undertook an investigation into the activities of the candidate's party. *See* Ross Sneyd, *Progressives Sue to Ensure Public Financing for Pollina*, Associated Press, Mar. 12, 2002; *see also* Ross Sneyd, *Pollina's Lawyer Says He Won't Cooperate with AG's Probe*, Associated Press, Mar. 22, 2002. The candidate was then quoted as saying, quite understandably, "You have the Democratic Party asking the Democratic Attorney General based on an opinion of a Democratic secretary of state to investigate a Progressive Party candidate." Christopher Graff, *Anthony Pollina's Campaign Demeans Legislators*, Associated Press, Mar. 17, 2002. A system in which partisan politicians investigate and make rulings on how vigorous a campaign their opponents

Matching Funds, N.Y. Times, Sept. 8, 2001, at B6; Mirta Ojito, *Badillo Appeals Ruling on Campaign Fund Match*, N.Y. Times, July 25, 2001, at B4. A Campaign Finance Board later overturned that ruling but only after the primary election was over. *See A Bit Late for Race, Badillo Gets Funds*, N.Y. Times, Apr. 12, 2002, at B3.

may wage is not a confidence-builder.

VI. THE REMAND ON NARROW TAILORING

My concerns over the remand to the district court for various "findings" are fourfold. First, my colleagues' opinion draws no distinction between legislative facts, mixed questions of legislative fact and law, adjudicative facts, and issues of law -- on this record distinctions of crucial importance to any further proceedings in the district court and in this court. Second, it is unclear what parts of Act 64 my colleagues deem to be restrictive, and to what degree, thereby hampering if not precluding any comparison with alternatives. Third, vastly less restrictive alternatives with no constitutional implications are so obvious that a remand is unnecessary. Fourth, on many issues, the forum that needs to be heard from is not the district court but the Vermont legislature.

a) Legislative Facts, Adjudicative Facts, and Mixed Issues of Fact and Law

One of the difficulties I had with my colleagues' earlier opinion -- but did not elaborate in my earlier dissent -- was that it did not make clear which facts are of a legislative nature -- facts that determine the appropriateness of a rule of law -- and which facts are of an adjudicative nature – facts that affect the legal relations of the particular parties to a particular lawsuit. *See* Fed. R. Evid. 201, Notes of Advisory Committee on Rules (explaining the "fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.");

see also Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971) ("Adjudicative facts" are "facts about the parties and their activities, businesses, and properties, as distinguished from general facts which help the tribunal decide questions of law and policy and discretion.") (Friendly, C.J.) (internal quotation marks and citation omitted). Nor did my colleagues' earlier opinion separate factual matters from mixed issues of legislative fact and law. The remand for "fact finding" has now pushed these issues to the forefront.

1) The Distinction Between Legislative and Adjudicative Facts

I recognize that the distinction between legislative and adjudicative facts is no bright line and is often judicially finessed. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 403 (1942) ("courts have generally treated legislative facts differently from adjudicative facts, even though the distinction has not been clearly articulated"). In the present case, however, the perceived need for a remand appears to be based on the conviction that adjudicative facts need to be resolved. In my view, that is not so.

Legislative facts are factual assumptions or conclusions that cause a court to choose one rule of law rather than another or to hold that certain circumstances meet a particular legal test. *See* Fed. R. Evid. 201, Notes of Advisory Committee on Rules. Legislative facts thus govern all future cases implicating the particular rule of law or its application and are not subject to future challenge by a litigant save by an attempt to have the rule of law overruled. My colleagues' repeated reliance on the existence of an "arms race," their adoption of the "level of notice"/"effective advocacy" test defined by average past expenditures, and their conclusion that Act 64's expenditure limits meet that

test, all rest on factual assumptions about candidate spending. These assumptions are quintessential legislative facts.

Determination of legislative facts is not governed by the Federal Rules of Evidence. *See* Fed. R. Evid. 201, Notes of Advisory Committee on Rules. Nor are they subject to clearly erroneous review under Fed. R. Civ. P. 52. *See In re Asbestos Litigation*, 829 F.2d 1233, 1252 n.11 (3d Cir. 1987) (citing *Lockhart v. McCree*, 476 U.S. 162 (1986)). Instead, they are subject to *de novo* review, and appellate courts not only can find legislative facts on their own but they also usually do so. *See* Davis, *supra*, at 403-07 (describing Supreme Court and other cases in which appellate courts found legislative facts). The practice is so common that what technically might be called mixed issues of legislative fact and law are often treated simply as issues of law. Whether expenditure limits set at the level of average past spending are sufficient for "effective advocacy," for example, is just such an issue.

Adjudicative facts determine the legal relations of particular parties with regard to particular issues of controversy. Adjudicative facts do not govern the results of future litigation -- save for the application of doctrines of preclusion such as res judicata and collateral estoppel. Determination of these facts is governed by the Federal Rules of Evidence and may be based on credibility determinations. Significantly, adjudicative facts are subject to clearly erroneous review on appeal under Rule 52. Fed. R. Civ. P. 52(a). Examples of adjudicative facts are whether one party struck another by driving an auto through a red light.

2) Remand for "Findings" of Legislative Fact and of Law

In my view, my colleagues fail to observe the

adjudicative/legislative distinction because they view legislative facts relating to the constitutionality of Act 64 as the sole province of the district court, while an appellate court may address only the legal issues arising from these facts. As their opinion expressly states, "[A]lthough we do not question the validity of the factual findings developed by the legislature in support of Act 64, our system of judicial review provides plaintiffs the opportunity to present competing evidence, assigns to the District Court the responsibility for making findings of fact and conclusions of law after weighing the evidence, and leaves to the Court of Appeals the independent responsibility to assess the legal significance of these factual findings." Maj. Op. at 35 (footnote omitted). As a result, the remand in the present case seeks findings on legislative facts, mixed issues of legislative fact and law, and even pure questions of law.

My colleagues remand for findings on whether higher limits would achieve the anti-corruption and anti-time consumption goals and "impinge less on the First Amendment rights of candidates and voters." *Id.* at 73-75. This inquiry is described by them as a "fact intensive question of whether that point is set in Act 64 or appreciably higher" and apparently is viewed as an adjudicative fact as to which the district court may make credibility determinations that are binding on this court unless clearly erroneous. *See id.* at 74; Fed. R. Civ. P. 52 (a). However, the issues are clearly ones of mixed legislative fact and law that can and should be decided by this court.

It is undisputed that: (i) the view that Act 64's limits will not substantially affect candidate spending is arrived at only by averaging in spending in essentially non-contested elections and using a definition of spending much narrower -- one that excludes all related expenditures by individuals and political parties -- than that used by the Act; and (ii) even under the narrow definition, the limits are far below

spending in actual contested elections in Vermont, including spending by third party candidates. All that is left is the legal question of the sufficiency of the governmental interest in justifying the restrictions on speech.

My colleagues also remand for what they describe as "fact-finding on [the] issues" of

> (1) what alternatives were considered by the legislature, including both alternative *types* of regulations and alternative *amounts* for the limits; (2) why these alternatives were rejected; (3) whether and how these alternatives would impinge less on First Amendment rights; and (4) whether the alternatives would be as effective as the mandatory spending limits in advancing the time-protection and anti-corruption interests.

Maj. Op. at 74 (footnote omitted). None of these issues involves adjudicative facts. Issues (3) and (4) are clearly questions of mixed legislative fact and law, if not solely of law, while issues (1) and (2) involve determinations of legislative history.

For yet another example, footnote 24 of my colleagues' opinion indicates that "findings" are to be made on remand as to a pure matter of law: whether required reports of spending by candidates for past elections included "related expenditures" as defined in Act 64, *i.e.* including spending by individuals and political parties. *Id.* at 72-73 n.23. This is an issue of Vermont law over which there is no dispute. Prior Vermont law never mentioned "related expenditures"; the term was first introduced and defined in Act 64; before that there were contribution limits on individuals, and political parties could give and spend freely;

there are, therefore, no "facts" to find.

In the same footnote my colleagues also ask for findings with regard to whether "legal and record-keeping costs of compliance with [Act 64] will also inflate future candidates' expenditures." *Id.* My colleagues appear to concede that such costs are expenditures and are therefore limited by Act 64. What more need be known? There are no adjudicative facts at issue here. The Secretary of State has advised candidates to obtain legal advice, and any legal or record keeping costs will drastically affect, say, a House candidate who must wage both a primary and general election contest with a total two-year expenditure limit of $2,000. The trees in Vermont may be beautiful, but needed professional services do not grow on them.

My colleagues now concede that this court will apply *de novo* review to legislative facts found by the district court. *Id.* at 73 n.24. However, my colleagues make no attempt to inform the parties and the district court of what findings are to be of legislative fact and what are to be of adjudicative fact. For example, my colleagues' remand for "fact-finding" on the types and amounts of limits rejected by the Vermont legislature and the reasons for rejection. *Id.* at 74. I see no comparative advantage in the district court's researching this question of legislative history unless it is contemplated -- and I assume it is not -- that the district court will take testimony on the state of mind of the then-legislators, resolve credibility issues, and find facts on these issues.

My colleagues do agree that a distinction between legislative and adjudicative facts exists and that legislative facts are reviewed *de novo* while adjudicative facts are reviewed under the "clearly erroneous" standard. However, they never identify which of the many "findings" to be made on remand are legislative and which are adjudicative, and, therefore, what rules to apply to each. This failure will

greatly complicate further proceedings.

In my view, virtually all the issues remanded are ones of legislative fact or of law, and, therefore, there is no reason for a remand. Moreover, if my colleagues believe that further findings of legislative fact are needed, they can request briefing of the relevant issues by the parties, rather than returning questions of law to the district court only to have us later resolve them *de novo*.

b) Failure to Define What is Restrictive About Act 64

Clarification is also needed with regard to the inquiry on remand as to whether there are less restrictive alternatives available. As I said at the outset of this dissent, my colleagues still fail to analyze much of what Act 64 actually says and does, and, as a result, their opinion contains few descriptions of significant political speech that they deem to be restrained by Act 64. An inquiry into less restrictive alternatives requires some identification and discussion of those restrictions for which an alternative might be substituted. That is to say, an available legal rule may be deemed less restrictive only after its restrictions are compared with the restrictions of an existing legal rule. *Colorado II*, 533 U.S. at 464-65 (comparing restrictiveness of existing limitation on coordinated expenditures with available legal rule limiting contributions alone). However, my colleagues' opinion neither acknowledges nor denies that Act 64: intrudes on grassroots activities of ordinary citizens, restricts the press' editorializing or reporting on political events, disadvantages candidates who must run in two elections rather than one, and so on and so on.

The *lacunae* in my colleagues' opinion are nowhere better exemplified than by the remand with regard to related expenditures. Maj. Op. at 76. The two sentences directing

this remand precede a discussion upholding Act 64's treatment of related expenditures as contributions. That discussion notes that limits on related expenditures are designed to avoid evasions of the limits on contributions. *Id.* at 90-96. For example, if someone can both lend office space to a candidate and make a cash contribution at the maximum limit, that person can evade the limits.

Before this discussion, their opinion states "On remand, independent of the constitutionality of expenditure limits, the district court should evaluate [the constitutionality of treating related expenditures as candidate expenditures]." *Id.* at 76. Of course, one reason the related expenditure provision was included in Act 64 was that cash or in-kind expenditures by individuals coordinated with a campaign are an obvious method of evading candidate expenditure limits as well as contribution limits. To return to the prior example, if a person lends office space to a candidate, the cost must be treated as an expenditure subject to the limits on campaign expenditures, or those limits can be evaded. Because Act 64 reflects the view that expenditure limits cannot be effective without treating individual and party related expenditures as expenditures by the candidates, it is enigmatic, to say the least, to ask the district court to evaluate "this issue . . . independent of the constitutionality of expenditure limits." My colleagues appear to be troubled by Act 64's limits on related expenditures but fail to describe or discuss the reasons for their disquiet. Such a description or discussion would surely be helpful to the district court and the parties.

c) The Existence of a Less Restrictive Alternative

I turn now to the question of whether, if Act 64 contains the restrictions described in this dissent, there are less restrictive alternatives. My colleagues frame this issue as an inquiry into what alternatives were actually considered by the Vermont legislature. *See* Maj. Op. at 74. That is not the

proper inquiry.[31] A state may not impose laws suppressing political speech and then successfully defend them on the ground that it was ignorant of alternatives. Rather, the issue is the existence of less restrictive alternatives, not whether a particular legislature considered them. *See Boos v. Barry*, 485 U.S. 312, 329 (1988); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 2 80 n.6 (noting that the term "narrowly tailored" "require[s] consideration of whether lawful alternative and less restrictive means could have been used").

Moreover, when properly framed, the answer to the inquiry is so self-evident in the present case that a remand is unnecessary: a combination of public and private financing with low contribution limits is infinitely less restrictive -- is actually speech supportive -- and accomplishes all of the ostensible purposes of Act 64's expenditure limits. Public financing of campaigns is of unquestioned validity, *see*

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[31] In a footnote responding to this dissent, my colleagues concede that "[o]f course, the ultimate issue for the District Court on remand is whether there exists a less restrictive type or degree of regulation that would serve Vermont's compelling anti-corruption and time-protection interests; it is not merely whether the legislature *considered* such an alternative." Maj. Op. at 74-75 n.25 (emphasis in original). Unfortunately, the text of their opinion continues to direct the district court on remand to consider only what was "considered" by the legislature. *See id.* at 74 ("On remand, the District Court ought consider, . . . (1) what alternatives were considered by the legislature, including both alternative *types* of regulations and alternative *amounts* for the limits; (2) why these alternatives were rejected; (3) whether and how these alternatives would impinge less on First Amendment rights; and (4) whether the alternatives would be as effective as the mandatory spending limits in advancing the time-protection and anti-corruption interests.") Were I to eliminate my criticism of their text, their footnote would become superfluous and similarly removed, leaving the text of their opinion stating the incorrect standard.

Buckley, 424 U.S. at 57, n.65, 85-109, and, combined with low limits on private contributions, can guarantee a critical mass of funds to all candidates, thereby freeing candidates of improper influence from particular donors and relieving candidates of the need for extensive fundraising. Such a combination of public and private financing with low contribution limits would impose only a modest burden on taxpayers, who, we are told, are anxious to eliminate undue influence by donors.

My colleagues suggest in a footnote, *see* Maj. Op. at 75 n.25, that the conclusion that a combination of public and private financing would satisfy the goals of Act 64 is neither self-evident nor supported by the record. To the contrary, if any conclusion is established, it is this one. As my colleagues' opinion repeatedly states, low contribution limits further the anti-corruption goal. And, as the Vermont legislature has stated, public financing (provided in gubernatorial races) furthers both the anti-corruption and time protection goals. 1997 Vt. Laws P.A. 64 (H.28) (findings nos. 11 and 12). Public funding money does not come from private sources, is quickly obtained, and lessens the need for private money because it is as negotiable.

The problem with this speech-supportive alternative is not its dubious merit but the fact that incumbent legislators know that a combination of public and private financing would vastly increase the number and viability of challengers. The dark secret of campaign finance reform is that its proponents avoid this alternative in a Faustian bargain with incumbent legislators who reject it out of self-interest. Incumbents prefer speech-limiting expenditure limits, a preference that will gain in intensity if federal courts will allow such limits to be based on past average spending and to be upheld so long as they do not drive challenger campaigns below "the level of notice."

d) Remanding to the Wrong Forum

As I have argued above, even if expenditure limits were not *per se* illegal, the limits set by Act 64 are so ridiculously low that they fail under any reasonable standard. In fact, they are so low that they would diminish spending by third party candidates, not generally regarded as generators of "arms races," and would limit even modest grassroots activities by supporters. Similarly, the restrictions on spending by local party affiliates fail because no reason has been offered to justify them. Holding the expenditure limits and the restrictions on the financial organization of political parties unconstitutional would send these issues back for reconsideration to the proper forum -- the Vermont legislature.

My colleagues show great deference to the Vermont legislature and to the various legislative proponents of Act 64 whose views are in the record. This deference is entirely undeserved. There is not the slightest evidence that either the legislature or those proponents ever examined the details of the Act or how they impact those ordinary political activities that are indispensable to democratic rule. Consequently, the legislators never weighed Act 64's costs in suppressed activity. There is no evidence of any discussion of, *inter alia*, the effects on grassroots activity, the two-year cycle, the effect on the press, the costs of legal services to candidates, or the radical restructuring of political parties.

In fact, their own testimony suggesting that "meet and greet events" such as "spaghetti suppers," "little parties" for "150 people" to which "a couple hundred people" are invited by mail, booths at county fairs, barbecues, and op-ed articles in the press are campaigning methods not involving Act 64's expenditure limits, *see supra* Part II(b), itself reflects an awesome ignorance of Act 64's provisions. Moreover, it is certainly hard to find any explanation other

than ignorance of the contents of Act 64 for the fact that the executive director of the Vermont Democratic party challenged, as harmful to grassroots activities, the ruling by the Secretary of State that Act 64's limits on contributions to parties treat all party affiliates as a single unit, *see Secretary of State Being Criticized for Fund Raising Ruling*, Associated Press, May 28, 1999, even though the ruling simply followed the plain language of the Act.

The lobbyist who secured passage of Act 64, who has been described as its author, and who is quoted at great length in my colleagues' opinion, has since brought an action in the district court to have the treatment of related expenditures declared unconstitutional as infringing on the (his) right to engage in political activities. *See Vermont Reformer Says Law He Authored Is Unconstitutional*, Political Finance, The Newsletter, March, 2002 (describing Anthony Pollina's lawsuit to have Act 64 ruled unconstitutional); Ross Sneyd, *Progressives Sue To Ensure Public Financing for Pollina*, Associated Press, March 12, 2002 (noting that Anthony Pollina calls his lawsuit "ironic"); *see also* Complaint at 1, *Pollina v. Markowitz*, No. 2:02-CV-63 (D. Vt. Mar. 11, 2002) ("Plaintiffs claim that certain provisions of Act 64 violate their First Amendment free speech and association rights, do not serve compelling state interests, and violate equal protection and due process of law, both facially and as applied.")

Officeholders have filed disclosure forms that indicate a continuing lack of knowledge of the requirements of Act 64, in particular the need to record and disclose mileage and the value of office space and outside professional services. *See, e.g., Campaign Finance Report of William Doyle*, Dec. 16, 2002 (listing no mileage expenses for himself or any supporters, or any value derived from use of office space, computers, utilities, etc., or any outside legal or accounting services); *Campaign Finance Report of*

William Doyle, Sept. 25, 2002 (same); *Campaign Finance Report of William Doyle*, Oct. 25, 2000 (same); *Campaign Finance Report of Anthony Pollina*, Dec. 16, 2002 (listing no mileage expenses for any supporters or any value derived from use of office space, computers, utilities, etc., or any outside legal or accounting services); *Campaign Finance Report of Jeb Spaulding*, Dec. 15, 2002 (same); *Campaign Finance Report of Deborah Markowitz*, Dec. 16, 2002 (listing no expenses for value of office space, computers, utilities, basic office supplies, etc., or any outside legal or accounting services); *Amended Campaign Finance Report of Deborah Markowitz*, Oct. 29, 2002 (same); *Campaign Finance Report of Deborah Markowitz*, Dec. 18, 2000 (same). The actual spending by other proponents of Act 64 also belies their opinions as to the reasonableness of Act 64's limits. *See supra*, Part IV(b)(1)(C) (describing Act 64 proponents who exceeded its limits in past elections).[32]

Deference to a legislative judgment is due when some minimal effort has been made by legislators to weigh the relevant factors and strike a minimally informed balance. There is no evidence of any such legislative effort with regard to Act 64's actual effect on political activity.

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[32] Even where proponents do report spending for mileage, the numbers are rounded-off and therefore appear to be estimates. *See, e.g., Campaign Finance Report of Anthony Pollina*, Sept. 25, 2002 (reporting in kind contribution of mileage by self of $2720); *see also Campaign Finance Reports of Deborah Markowitz*, Sept. 25, Oct. 25, and Dec. 16, 2002 (reporting in kind contributions of "postage, travel, phone") by Paul Markowitz of $525, $460, and $120, respectively). These round numbers are not divisible by 31¢ -- the per mile cost of gas assigned by the Vermont Secretary of State; *see 2001 Memorandum, supra*.

Even under my colleagues' legal theory, therefore, the Act's limits on expenditures must be struck down as well below any reasonable constitutional standard, and the limits on local party affiliates must be invalidated for the lack of any proffered justification. Such a ruling would leave the Vermont legislature in a position to deliberate on the full ramifications of its actions in considering new legislation but still free to pursue it. *See Quill v. Vacco*, 80 F.3d 716, 742 (2d Cir. 1 996) (Calabresi, J., concurring) ("no court need or ought to make ultimate and immensely difficult constitutional decisions unless it knows that the state's elected representatives and executives -- having been made to go, as it were, before the people --assert through their actions (not their inactions) that they really want and are prepared to defend laws that are constitutionally suspect"), *rev'd*, 521 U.S. 793 (1997); *United States v. Then*, 56 F.3d 464, 466 n.1 (2d Cir. 1995) (Calabresi, J., concurring) ("when factual developments have made a law's prior justification constitutionally invalid, it is up to the legislature to decide whether to advance another state interest in support of that law") (citing *Abele v. Markle*, 342 F. Supp. 800, 810-11 n.18 (D. Conn. 1972) (Newman, J., concurring), *vacated*, 410 U.S. 951 (1973)); *Tunick v. Safir*, 209 F.3d 67, 74 (2d Cir. 2000) (implying that state suicide statute could have been interpreted not to ban assisted suicide because "the New York Court of Appeals had never clarified, and the legislative history cast some doubt upon, the question of whether the New York ban on assisted suicide, first enacted in 1828, was ever meant to apply to a treating physician") (internal quotation marks omitted).

VII. CONCLUSION

In holding, with only one dissenting vote, that limits on candidate expenditures are unconstitutional, *Buckley* simply followed the mainstream First Amendment jurisprudence that is applied to communicative activity of far

less constitutional significance than political speech. *See, e.g.*, *Stanley*, 394 U.S. at 567 (disallowing speculative governmental interest in banning obscene material as justification for statute restricting nonpolitical speech); *Smith v. California*, 361 U.S. 147, 151 (1959) (applying "stricter standards" in statutory scrutiny where statute has "a potentially inhibiting effect on speech"). That jurisprudence calls for scrutiny that does not take unquestioningly and at face value the claims of a law's proponents without actually examining the law. *See Buckley*, 424 U.S. at 40-41 (stating that "[b]efore examining the interests advanced" in support of legislation, "[c]lose examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests"); *id.* at 41 ("The test is whether the language of [the statute] affords the '[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'") (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). That jurisprudence demands that a law restricting speech, including editorializing speech by the press, spell out what it permits and what it prohibits in intelligible detail, *see Forsyth*, 505 U.S. at 131, and not leave vast areas of discretion to those who must implement it. *See Thomas*, 534 U.S. at 323. That jurisprudence denies to government "the power to determine that spending to promote one's political views is wasteful, excessive, or unwise," *Buckley*, 424 U.S. at 57, and "to control . . . the quantity and range of debate on public issues in a political campaign," *id.* Under that jurisprudence, Act 64's limits on expenditures and party financing cannot be upheld. Under that jurisprudence, forcing a reorganization of political parties that reduces the autonomy of local party committees for no articulated reason is unconstitutional.

If one looks at what Act 64 says instead of what its proponents say about it, it is quite apparent that the Act does indeed embody the theory of the defense witness who opined

that government may regulate political speech the way it regulates electric companies, *see supra* Part III(a). Although Act 64 is said to be aimed at reducing the corrupt influence of "special interests" while enhancing the role of "ordinary citizens," it substantially disables ordinary citizens from meaningful participation in the political process. It cripples party organizations, particularly at the local level, and prevents individual grassroots activities on behalf of candidates, while organized economic interests retain the ability to engage in costly independent political advocacy. Moreover, the Act distinctly benefits the "special interest" that enacted it: incumbents.

In the beginning of this dissent, I quoted Justices Brandeis and Black on the dangers of high-minded assaults on liberty. In waging its broad attack on political activity in pursuit of its goal of transferring political power from "special interests" to "ordinary citizens," Act 64 also exemplifies the wisdom of another, albeit less August, source, Walt Kelly: "We have met the enemy, and he is us."

APPENDIX A

State of Vermont
Office of the Secretary of State
Representative Terry Bouricius
56 Booth Street
Burlington, VT 05401

December 3, 1999

Re: Your e-mail of October 8, 1999

Dear Representative Bouricius,

Please accept my apology for the delay in responding to your questions. The review of my proposed opinion took longer than anticipated. This letter is in response to the two questions which you raised in your e-mail. I will restate the questions to make sure we understand the fact patterns which I am addressing.

1. Can a political party which has no "candidates" as defined in 17 V.S.A. §2801(1) at the time the proposed poll is conducted, pay in excess of $500 for the conducting of a professional poll to seek potential voters opinions about selected potential candidates, both Progressive and otherwise, and share the poll results with potential candidates without the polling expense and associated political party activities triggering either a person named in the poll becoming a "candidate" as defined in §2801(1), nor disqualifying a person named in the poll from seeking public financing from the Vermont Campaign Fund, if a person named in the poll later decided to become a candidate?

The conducting of a poll by a political party to "test the waters" for various potential candidates will not trigger a "candidacy" for a person named in the poll even if more than $500 per potential candidate is expended by the party for the

poll so long as only the general results are used for recruiting, media releases, or other generalized activities. The conducting of the poll itself falls within the types of activities generally pursued by a political party for its overall organization, planning, and strategy. The political party can conduct a poll and can make the general results or the poll public without triggering any candidacies. The party can use the results of the poll in a general way for recruiting candidates. (For example, telling John Jones that he was the favorite in a potential race with 3 other names, would be general information which can be used for recruiting.) However, as I will discuss below, *the acceptance of detailed data and information from the poll by an individual will trigger a candidacy if the cost of the poll which is attributable on a pro rata basis to the provision of specific information and data to a particular candidate exceeds $500.*

The Vermont campaign finance law does not specifically address polling activities and expenses. The definition of "candidate" in 17 V.S.A. §2801(1) states that "an affirmative action" of "(A) accepting contributions or making expenditures of over $500" will trigger a candidacy. The definition of contribution includes "a gift of money or anything of value." It is when an individual accepts the detailed data and information gained from the professional poll, that "a gift of anything of value" is accepted, and if the specific information given to an individual cost over $500 to produce on a pro rata basis, then a candidacy will be triggered.

Because it is the acceptance of the gift of detailed data from the poll, not the polling itself, which can trigger a "candidacy," the political party could conduct a professional poll at any time but wait until after February 15, 2000 to offer any detailed data or information from the poll to an individual in order to avoid the prohibitions of the Vermont

campaign fund (public financing). The law states that if a person becomes a candidate before February 15 of the general election year, that person shall not be eligible for Vermont campaign finance grants, 17 V.S.A. §2853(a). Therefore, if before February 15th, a person accepts detailed data from a professional poll which is a gift of "anything of value" which cost over $500 to produce on a pro rata basis, the person has become a candidate by accepting a contribution totaling $500 or more, and will not be eligible for the Vermont campaign finance grants.

In summary, the political party can conduct polls and make the general results of the poll public without triggering any candidacies. If specific data and information is accepted by an individual which cost over $500 to produce on a pro rata basis, a candidacy is triggered. If the candidacy is triggered before February 15, 2000, the candidate will not be eligible for campaign finance grants. A political party and any individual considering accepting the detailed results of a poll should consult their own attorney to discuss specific fact patterns and how the law would be applied to those specific facts.

2. Can a political party spend in excess of $500 to arrange and sponsor dinners, other events, or party mailings for the purpose of educating party supporters or potential contributors about Vermont campaign finance grants and the need for "qualifying contributions"? Can the party make other preparations to assist a future candidate in gathering "qualifiers" for use after February 15, 2000?

Your question leaves room for many fact patterns so we will address three possible scenarios for such preparations, including dinners, events or mailings which we do not believe will trigger a candidacy and then discuss some additional considerations that might raise issues in the mind of an opposing candidate who could raise the issue using the

process in 17 V.S.A.§2809(e).

A. If the proposed events are for the sole purpose of educating voters about the need for many small contributors in order to qualify for Vermont campaign finance grants, to explain the importance of party organization, or to discuss any other topics related to general campaigning, the expenditures clearly would not trigger a candidacy.

B. If the party conducts mailings in which individuals are named or discussed as potential candidates because the party is hoping to generate interest in candidacies, but the individuals do not have knowledge of the fact that their names are mentioned, and the primary thrust of the activities are party organization and education of voters about the requirements of the campaign finance grant law, then the mailings would not trigger a candidacy.

C. If the party conducts other activities to develop a database of persons who might be willing to contribute "qualifying contributions" or solicits conditional pledges if an individual decided to run (see Secretary of State Letter of July 6, 1999), these activities would not trigger a candidacy.

D. However, if the party conducts dinners, events or mailings or solicits pledges in which potential candidates are introduced and discussed, and the potential candidates have participated in the planning of the events or given approval to them, the potential candidates will need to evaluate when or whether they might cross the line into candidacy by either accepting contributions or making expenditures of $500 or more by way of "accountability of related expenditures" as described in 17 V.S.A. §2809. We cannot anticipate every possible fact pattern that may develop as the party and potential candidates proceed, so we

merely want to raise the prospect that at some point the activities may raise questions in another candidate ' s mind and the opposing candidate may use §2809(e) to seek findings and a determination from a court. Each party and potential candidate should review proposed activities with their own counsel to examine the particular facts to evaluate whether they may fall into the category of activities addressed in 17 V.S.A. §2809 as "related expenditures" and possibly trigger a candidacy based upon accountability for a related expenditure of $500 or more.

This letter represents my opinion on the issues which you have raised. You may seek your own counsel to advise you in these matters. Assistant Attorney General Michael McShane has reviewed this advisory opinion on behalf of the Office of the Attorney General and that office concurs with this opinion. If you have any questions please contact me at 828-2304 or kdewolfe@sec.state.vt.us.

Sincerely,

Kathleen S. DeWolfe

Director of Elections
and Campaign Finance

cc: Michael McShane, AAG Distribution List

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2004

Docket Nos. 00-9159 (L), 00-9180 (Con), 00-9231 (xap), 00-9239 (xap), & 00-9240 (xap)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 11th day of February, two thousand and five.

MARCELLA LANDELL,

Plaintiff-Appellee,

DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC., Political Committee, NEIL RANDALL, GEORGE KUUSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs-Appellees-Cross-Appellants,

--v.--

WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES D. MCNIGHT, KEITH W.

FLYNN, JAMES P. MONGEON, TERRY TRONO, DAN DAVIS, ROBERT L. SAND and DEBORAH L. MARKOWITZ,

Defendants-Appellants-Cross-Appellees,

VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT, RURAL VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA THOMPSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

A poll on in banc rehearing was conducted among the active judges of the court, a majority of whom voted to deny rehearing in banc. Judges of the court expect to file opinions in due course.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By:_____
Lucille Carr

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2004

Docket Nos. 00-9159 (L), 00-9180 (Con), 00-9231 (xap), 00-9239 (xap), & 00-9240 (xap)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 11th day of April, two thousand and five.

MARCELLA LANDELL,

Plaintiff-Appellee,

DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC., Political Committee, NEIL RANDALL, GEORGE KUUSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE and VERMONT RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Plaintiffs-Appellees-Cross-Appellants,

--v.--

WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES D. MCNIGHT, KEITH W.

FLYNN, JAMES P. MONGEON, TERRY TRONO, DAN DAVIS, ROBERT L. SAND and DEBORAH L. MARKOWITZ,

Defendants-Appellants-Cross-Appellees,

VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT, RURAL VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL RIVERS and MARIA THOMPSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

ORDER

Plaintiff-appellee and plaintiffs-appellees-cross-appellants filed a petition for rehearing with request for rehearing in banc from the amended opinion of the panel filed on August 18, 2004. A poll on whether to rehear the case in banc was conducted among the active judges of the court upon the request of an active judge of the court. Because a majority of the court's active judges voted to deny rehearing in banc, rehearing in banc was **DENIED** by order of the court filed February 11, 2005.

The court hereby **AMENDS** that order to further reflect that, upon consideration by the panel that decided the appeal, as of the date of that order, the petition for rehearing was **DENIED.** Judge Winter dissents from the denial of rehearing.

The court also **AMENDS** the February 11, 2005, order to reflect (1) the opinions concurring in the court's denial of rehearing en banc filed by Judges Straub and Pooler and Judges Sack and Katzmann, and (2) the opinions dissenting from the court's denial of rehearing in banc filed by Chief Judge Walker, Judge Jacobs, and Judge Cabranes.

Judges Straub, Pooler, Sack, Sotomayor, Katzmann, and B.D. Parker concur in the denial of rehearing en banc. Chief Judge Walker and Judges Jacobs, Cabranes, and Wesley dissent from the denial of rehearing in banc. With this order, Judges Straub and Pooler are filing a concurrent opinion; Judges Sack and Katzmann are filing a concurring opinion, in which Judges Sotomayor and B.D. Parker join; Chief Judge Walker is filing a dissenting opinion, in which Judges Jacobs, Cabranes, and Wesley join; Judge Jacobs is filing a dissenting opinion, in which Chief Judge Walker and Judges Cabranes and Wesley join; and Judge Cabranes is filing a dissenting opinion, in which Chief Judge Walker and Judges Jacobs and Wesley join.

Other judges of the court have indicated that they expect to file opinions concurring in the denial of in banc rehearing in due course. Further dissenting opinions may also be forthcoming. If further opinions or amended opinions are filed, this order will be amended as necessary to reflect those opinions.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By:_____
Richard Alcantara, Deputy Clerk

STRAUB and POOLER, Circuit Judges, concurring in the denial of rehearing *en banc*:

We concur in the Court's decision to deny rehearing *en banc*.

Sack and Katzmann, Circuit Judges, with whom Sotomayor and B.D. Parker, Circuit Judges, join, concurring in the decision to deny rehearing en banc:

We agree with the decision of the Court not to rehear the decision of the panel en banc. We think it appropriate, in light of the opinions that are being filed dissenting from this view, to add a few words.

The issue for us, of course, is not whether the opinion for the panel majority or the dissent was right. Judge Winter's opinion dissenting from the panel opinion, *see Landell v. Sorrell*, 382 F.3d 91, 149 (2d Cir. 2004) (Winter, J., dissenting), is indeed thorough and forceful. Assuming that it is as sound as the dissenters say that it is, however, as Judge Feinberg reminded us in *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc) (per curiam), "[m]ere substantive disagreement with a panel decision is not, under FRAP 35, [[1]] sufficient reason for an in banc rehearing. If we do not follow the clear spirit of the Rule, we will become mired in endless internal review," *id.* at 941 (citing Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit, 1984-1988*, 55 Brook. L. Rev. 355, 369 (1989); Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit: The*

[1] "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 25(a).

Virtues of Restraint, 50 Brook. L. Rev. 365, 382 (1984)); *see also* James L. Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 Stan. L. Rev. 387, 392-93 (1995). The issue for us, then, is whether to grant a rehearing en banc because "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2).

Whether the question here is "of exceptional importance" is, for us, a close call. The issue of campaign finance and its relationship to First Amendment protection for political expression is obviously important, at least as a general matter. It is less clear to us, though, that the decision in the case that we are being asked to review is, at this stage, itself "exceptionally" important.

This case has been remanded to the United States District Court for the District of Vermont for further proceedings. Vermont and Vermonters may, in the course of or in connection with the proceedings in the district court, resolve these issues themselves. As for the impact of the decision elsewhere, if any, we simply do not know. We could only join the dissenters in speculation.[2] But if the Supreme Court does not grant certiorari in *Landell* or otherwise resolve the questions raised, and the panel opinion *does* lead other legislative bodies in this Circuit to enact campaign finance laws that share the characteristics of the Vermont law that Judge Winter thought constitutionally flawed, the doors to this Court will be open to a challenge. The resolution of such a challenge may ultimately indeed require en banc review. We may at that time need to reconsider the merits of the panel's decision en banc.

[2] Chief Judge Walker speculates, *ante* at 5-6, that the panel opinion "*could* lead other legislative bodies in Vermont, and in other states within and without this circuit, to enact campaign-finance laws that trammel free-speech rights," and Judge Jacobs asserts, *ante* at 28, that "[t]he green light has been given to New York and Connecticut (signatories to the States' amicus brief in support of the Act), the hundred counties, and the thousand municipalities under our jurisdiction, to consider and adopt similar limitations on campaign expenditures."

We think that some disputes, because of their highly partisan and political caste, should be addressed by the federal judiciary only when and insofar as is necessary. And we think that this is such a dispute. The resolution of this sort of campaign financing issue is bound to have, or at least to be seen to have, an impact favoring one political side or another depending on the result. We would prefer not to enter into a process that would likely result in a decision of our full Court that would therefore be vulnerable to accusations that it is driven by result rather than by legal analysis.[3] We should avoid it if we can do so responsibly.

We very much doubt, moreover, that were we to rehear this case en banc our work would add substantively to the Supreme Court's deliberations. Were the Supreme Court to decide to grant certiorari in this case, it would have before it the panel majority and dissenting opinions sharply defining the issues as well as the dissenting and concurring views as to whether this Court should undertake to rehear the panel decision en banc. If the dissenters are correct that the panel majority opinion fails to pass constitutional muster, a rehearing en banc of the panel decision would only forestall resolution of issues destined appropriately for Supreme Court consideration.

When it becomes, to use Chief Judge Walker's phrase, our "constitutional responsibilit[y]" to rehear this issue en banc – as it was the constitutional responsibility of the panel to hear it in the first place – of course we should do

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[3] As noted, we think it unnecessary to take issue with the substantive views of our colleagues dissenting from the denial of an en banc hearing. We do note, nonetheless, the remarkable proposition asserted in part V of Judge Jacobs' dissent, *ante* at 30-32 (apparently one of the things, as he puts it, that he "cannot resist saying," *id.* at 21): that at the heart of the panel majority's problems are "constitutional-law professors" and "news organs" subverted by a hidden agenda of some sort, *ante* at 30-31. Suffice it to say that we doubt it. But it is this sort of suspicion of hidden agendas when addressing things political that helps animate our view that en banc rehearing is unwise at this time.

so. Until then, we think the Court has rightly decided to respect what Judge Newman referred to as the "Virtues of Restraint." *See* Jon O. Newman, *Foreward: In Banc Practice in the Second Circuit: The Virtues of Restraint, supra.*

JOHN M. WALKER, JR., Chief Judge, with whom DENNIS JACOBS, JOSE A. CABRANES, and RICHARD C. WESLEY, Circuit Judges, concur, dissenting from the denial of rehearing in banc:

Among the many questionable features of Vermont's campaign- finance statute, the limits placed on campaign expenditures plainly violate Supreme Court precedent and the First Amendment. After a panel majority, over a well-reasoned dissent by Judge Winter, held that those limits were supported by a compelling interest, the full court should have reheard this case in banc. I dissent.

I. Background

In 1997, the Vermont Legislature enacted Act 64, a comprehensive campaign-finance statute scheduled to take effect on November 4, 1998. *See* Vt. Stat. Ann. tit. 17, §§ 2801-2883. In May 1999, a voter, a prospective candidate, and a political-action committee brought suit in federal court in Vermont alleging that the statute infringed their First Amendment rights. *See Landell v. Sorrell*, 118 F. Supp. 2d 459, 463, 475-76 (D. Vt. 2000) (*Landell I*). The district court consolidated that suit with two other subsequent actions and permitted various other interested groups to intervene. *Id.* at 463. After a ten-day bench trial in May and June of 2000, the district court upheld most of Act 64's challenged provisions but struck down its limitations on (1) how much money political parties could contribute to candidates, (2) how much

money candidates could accept from out-of-state contributors, and (3) how much money candidates could spend on their campaigns. *Id.* at 468, 493.

Four years later, in 2004 (after having withdrawn an opinion issued in 2002), a divided panel of this court upheld in part and reversed in part the district court's decision. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004) (*Landell II*). The panel unanimously upheld the district court's determination that the Vermont statute's limitation on out-of-state contributions was unconstitutional. *Id.* at 146; *id.* at 152 (Winter, J., dissenting) (concurring in this holding). The panel also unanimously reversed the district court's decision that contributions to candidates by political parties could not constitutionally be limited. *Id.* at 143 (so holding, but remanding for further findings on, among other issues, how Act 64 affects relations between national parties and state and local affiliates); *id.* at 152, 184-85 (Winter, J., dissenting) (concurring in this holding though challenging statutory provisions that treat party affiliates as one unit for some purposes). The panel was divided, however, over the constitutionality of the Vermont statute's limitations on candidates' campaign expenditures. Judge Winter, in dissent, would have upheld the district court's determination that campaign-expenditure limits are unconstitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). *Landell II*, 382 F.3d at 153-56, 185-89 (Winter, J., dissenting). But the panel majority decided that the expenditure limits were supported by two government interests – preventing corruption and preserving candidates' time – that, taken together, were sufficiently compelling that the expenditure limits might be constitutional if the statute were sufficiently narrowly tailored to advance those two interests. *Id.* at 124-25. The majority therefore vacated the district court's holding as to the expenditure limits and remanded the case for further proceedings to determine whether the limits were sufficiently narrowly tailored to survive strict scrutiny. *Id.* at 135-36.

Judge Winter, in an impassioned, insightful, and carefully reasoned dissenting opinion, analyzed the Vermont statute in detail and identified a series of constitutional infirmities that the panel majority failed to consider sufficiently. *Id.* at 149-210 (Winter, J., dissenting). While I agree with virtually all of Judge Winter's analysis of the Vermont statute's many flaws, the panel majority erred most obviously, and most importantly, in not striking down the Vermont law's campaign-expenditure limits as violating the First Amendment's free-speech guarantee.

By leaving open the possibility that meager, incumbent-protective spending limits might pass constitutional muster, the majority has done a huge disservice to Vermont voters and has established a dangerous precedent that could lead other legislative bodies in Vermont, and in other states within and without this circuit, to enact campaign-finance laws that trammel free-speech rights and ensure incumbent protection.

Supreme Court precedent – principally the landmark holding in *Buckley v. Valeo* – leaves no doubt that the constitutional protection of political speech is essential to the very framework on which our political system is built. That precedent also plainly forbids campaign-expenditure limits like Vermont's. The in banc court should have reheard this exceptionally important case, found categorically that the Vermont law's expenditure limits violate the First Amendment, and wiped out the panel's holding that not only accepted a justification for Vermont's expenditure limits that the Supreme Court has rejected, but also glossed over the fact that the limits are so low that they unconstitutionally entrench incumbents. Instead, regrettably, the law of the circuit now conflicts both with Supreme Court case law and with decisions from the Tenth and Sixth Circuits holding similar campaign-expenditure limits unconstitutional. *See Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998).

II. Discussion

A. Supreme Court precedent compels reversal

In the nearly thirty years since *Buckley*, the Supreme Court has not retreated from *Buckley*'s holding that laws limiting campaign expenditures are subject to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." 424 U.S. at 44-45. Although contribution limits merit "less rigorous scrutiny," *McConnell v. FEC*, 540 U.S. 93, 141 (2003), expenditure limits must survive strict scrutiny – i.e., they must be "narrowly tailored to serve a compelling state interest." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990). First Amendment protections extend to campaign expenditures because "[c]ertainly, the use of funds to support a political candidate is 'speech'...." *Id.* As *Buckley* explained:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19 (footnote omitted).

The Court has identified only one distinct compelling state interest that can support campaign-finance restrictions: preventing corruption and the appearance of corruption. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are *the only* legitimate and compelling government interests

thus far identified for restricting campaign finances.") (emphasis added). The Court has relied on that interest, with a limited exception not relevant here, to uphold only contribution limits, *not* expenditure limits.[4] *See McConnell*, 540 U.S. at 154, 161 (rejecting constitutional challenge to § 323(a) of the Federal Election Campaign Act, which "regulates *contributions*, not activities"); *FEC v. Beaumont*, 538 U.S. 146, 151-52 (2003) (rejecting constitutional challenge to federal ban on campaign contributions by corporations); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 381-85 (2000) (*Shrink Missouri*) (rejecting constitutional challenge to Missouri statute limiting campaign contributions); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 184-85 (1981) (rejecting constitutional challenge to federal statute limiting contributions to multicandidate political committees); *Buckley*, 424 U.S. at 23-36, 38 (rejecting constitutional challenge to federal statute limiting campaign contributions). The Court has also upheld restrictions designed to prevent the circumvention of contribution limits, but because those limits were themselves justified by an anticorruption rationale, anti-circumvention is not an independent state interest. *See, e.g.*, *McConnell*, 540 U.S. at 161 (noting that § 323(b) of the Federal Election Campaign Act, which the Court upheld, "is designed to foreclose wholesale evasion of § 323(a)'s anticorruption measures").

Further, in sweeping language *Buckley* rejected the state interest in limiting the overall cost of campaigns as a justification for campaign-finance restrictions:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our

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[4] The Court has upheld limits only on campaign expenditures by corporations out of the corporate treasury. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990).

> Constitution it is not the government, but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

424 U.S. at 57.

Along with limiting the potential justifications for campaign-finance restrictions and establishing that expenditure limits are subject to no less than strict scrutiny, *Buckley*, properly read, established a per se ban on limiting candidates' campaign spending out of personal funds. To be sure, reasonable jurists disagree about whether *Buckley* should be read to have declared *all* campaign-expenditure limits per se unconstitutional. *Compare Landell II*, 382 F.3d at 152 (Winter, J., dissenting) ("[*Buckley*] held, without qualification, that government may not limit campaign expenditures by candidates for electoral office."), *with Homans*, 366 F.3d at 915 (Tymkovich, J., concurring) ("I agree that the *Buckley* Court did not adopt a per se rule against campaign spending limits."). Perhaps it is most accurate to say that *Buckley's* ban on expenditure limits is as close as possible to being a per se ban without the Court having used those exact words.

In any event, *Buckley's* language about limiting what candidates can spend on their campaigns from their own personal resources is surely unequivocal. After explaining that governmental interests in preventing corruption and equalizing candidates' relative financial resources could not justify restricting what candidates for federal office could spend out of their own pockets on their campaigns (a restriction found in § 608(a) of the Federal Election Campaign Act of 1971), *Buckley* concluded: "[M]ore fundamentally, the First Amendment simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that § 608(a)'s restriction on a

candidate's personal expenditures is unconstitutional." 424 U.S. at 54.

In light of *Buckley's* exceptionally strong language about First Amendment protection for campaign expenditures – speech that goes to the heart of our constitutional democracy – it is not surprising that the Court has "routinely struck down limitations on independent expenditures by candidates, other individuals, and groups...." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (*Colorado Republican II*).

When viewed in light of this Supreme Court case law that reflects a deep suspicion of – indeed, hostility to – legislative attempts to restrict political speech by limiting campaign spending, Vermont's campaign-expenditure limits fare no better than the limits struck down in *Buckley*.

B. No compelling interest supports Vermont's expenditure limits

The *Landell II* majority purported to apply strict scrutiny to the Vermont statute's expenditure limits and concluded that, taken together, the state's announced interests in (1) preventing corruption and the appearance thereof and (2) reducing the amount of time devoted by candidates to fundraising were sufficiently compelling to justify those limits. *Landell II*, 382 F.3d at 124-25. The majority went on to find that it lacked enough information to decide whether the limits were sufficiently narrowly tailored to survive strict scrutiny and ordered that the case be remanded to the district court for consideration of whether less-restrictive alternatives could have fulfilled the same goals. *Id.* at 133-36.

Putting aside spending limits on a candidate's use of his or her own funds (which, as noted above, *Buckley* flatly prohibits, but which the Vermont law imposes and the *Landell II* majority did not strike down), *Buckley* required, at minimum, that the *Landell II* panel find that Vermont's

candidate-expenditure limits as a whole could not survive strict scrutiny for want of a compelling state interest. Here there was no compelling interest that could withstand strict scrutiny, and the panel therefore never had to reach narrow tailoring. The remand order was both unnecessary and unjustified.

First, *Buckley* makes plain that although the interest in reducing corruption or the appearance thereof may justify *contribution* limits, this interest cannot justify *expenditure* limits. As the Court noted in relation to the expenditure limits found in § 608(c) in the Federal Election Campaign Act of 1971, "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings." 424 U.S. at 55. This language forecloses courts from relying on the corruption-prevention rationale to support expenditure limits. Indeed, courts have regularly applied *Buckley* to strike down expenditure limits that were ostensibly justified by the need to prevent corruption. *See Homans*, 366 F.3d at 917 (Tymkovich, J., concurring, writing for panel) (observing that "candidate spending limits cannot be justified by the anti-corruption rationale"); *Kruse*, 142 F.3d at 915 (same); *see also Colorado Republican II*, 533 U.S. at 441. The Supreme Court has determined that the less-restrictive alternative of contribution limitations and disclosure requirements (both of which are found in Vermont's legislative scheme) suffice to prevent corruption, and it is not for us to gainsay this determination. The majority in *Landell II* paid lip service to this aspect of *Buckley*, *see* 382 F.3d at 119, but by relying on the anticorruption rationale in conjunction with the time-preservation rationale to justify expenditure limits, the majority ignored *Buckley's* holding that preventing corruption cannot justify expenditure limits.

Further, under the strict scrutiny that *Buckley* requires, the time-preservation rationale also cannot support expenditure limits. Indeed, the majority in *Landell II*

implicitly acknowledges the time-preservation rationale's weakness by joining it to the anticorruption rationale as a means of ginning up a sufficiently compelling interest. *Landell II*, 382 F.3d at 125 ("Vermont has established two interests that, *taken together,* are sufficiently compelling to support its expenditure limits....") (emphasis added).

First, *Buckley* expressly rejected cost containment (of which candidate time preservation is a function) as a justification for expenditure limits. 424 U.S. at 57. The *Landell II* majority, seizing on the fact that *Buckley* "alluded to this time-protection interest only in passing," 382 F.3d at 120, argues both that the Court did not consider it and that it (together with the discredited anticorruption interest) is a compelling justification for expenditure limitations. Both arguments fail. The time-preservation rationale was indeed argued to the Court under the rubric of cost containment, and it gains no strength from the fact that the Court rejected it summarily rather than at length. As Judge Tymkovich explained in *Homans*, "the *Buckley* Court did consider the exact argument made here, that the 'thirst for money has forced candidates to divert time and energy to fund-raising and away from other activities, such as addressing the substantive issues.'" 366 F.3d at 918 (Tymkovich, J., concurring, writing for panel) (quoting *Buckley*, Br. of Appellees Center for Public Financing of Elections, Common Cause, League of Women Voters of the United States at 72-73); *see also Landell II*, 382 F.3d at 188-89 (Winter, J., dissenting). The Sixth Circuit in *Kruse* also rejected the time-preservation rationale, noting that under *Buckley*, "because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts [*sic*] an officeholder from doing her job, cannot serve as a basis for limiting campaign spending." 142 F.3d at 916-17.

Moreover, in the nearly thirty years since *Buckley*, no court of appeals has found that saving a candidate's time from fundraising is a sufficient interest to justify stifling

political speech. Candidate time preservation cannot be a compelling interest because, while the government may have a generalized interest in reducing impediments to an officeholder' s performance of her job, the government has *no legitimate interest* in keeping incumbents in office at the expense of challengers. Where an officeholder complains that taking time to fundraise makes it harder to do the job and that the government has an interest in preventing this, the officeholder is saying in effect, "The government has an interest both in my doing my job and in getting me reelected by making campaigning (fundraising) easier." It has an interest in the former, but certainly not the latter. The decision to fundraise is the candidate's and, unless incumbent protection is a legitimate interest, not the business of the legislature. Judge Tymkovich suggests as much in *Homans* when he notes,

> [O]fficeholders are not "forced" to spend any time making calls or otherwise seeking funds. That they choose to do so (allegedly at the expense of their other duties) seems to be a rather weak reason to override core First Amendment concerns. Freeing politicians from having to make that choice is not a compelling governmental interest.

366 F.3d at 919 (Tymkovich, J., concurring, writing for panel) (footnote omitted). Weighed against *Buckley*'s broad protection of political speech, concerns about fundraising time pale in significance.

Finally, by holding that preserving candidates' time is a compelling justification for Vermont's expenditure limits, the *Landell II* majority has given its blessing to circular, self-justifying legislation. The Vermont statute forbids candidates to accept individual contributions from nonfamily members exceeding $200 (if running for state representative or local office), $300 (if running for state senator or countywide office), or $400 (if running for statewide office). Vt. Stat. Ann. tit. 17, § 2805(a). Though laughably low, the panel

majority unanimously found these contribution limits to be constitutional. Setting aside my serious doubts on that score, such low limits require candidates to spend more time fundraising than would higher limits. In other words, the Vermont law's contribution limits increase demands on candidates' time, and the expenditure limits are then justified on the basis of time pressures that the law itself has intensified. The *Landell II* majority recognized that "without spending limits, the contribution limits would exacerbate the time problem," 382 F.3d at 123, but was untroubled by the self-evident circularity of the time-preservation rationale. Justifying a statute based on problems that the statute itself creates makes about as much sense as Baron von Munchausen's boast that he pulled himself up out of a swamp by his own hair. *See, e.g.*, The Adventures of Baron Munchausen (Columbia Pictures 1989).

C. The Vermont law's expenditure limits are so low that they give incumbents an unfair electoral advantage

If the majority in *Landell II* gives too little deference to *Buckley*'s guiding force, it gives too much deference to the Vermont legislature. Even Justice Breyer, who would prefer to give legislators more leeway in regulating campaign finance than governing Supreme Court doctrine provides them, cautioned against deferring to legislators if that deference "risk[s] such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge." *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring).

Vermont's expenditure limits (and, in my view, its contribution limits) are set so low and in such a fashion that only a desire to protect incumbents can explain them. At a time when the costs of political campaigns are routinely counted in the millions, what are Vermont's expenditure limits? To persuade voters of the merit of their candidacies,

those who seek the office of state representative can only spend $2000 (in single-member districts) to $3000 (in two-member districts); state senate candidates are limited to $4000 (in single-member districts) plus $2,500 per additional seat in the district (in multi-member districts); candidates for governor and lieutenant governor are capped at $300,000 and $100,000, respectively; and candidates for other statewide offices can only spend $45,000. Vt. Stat. Ann. tit. 17, § 2805a. The *Landell II* majority held that these limits were not unconstitutionally low because they approximated average spending in past elections. 382 F.3d at 128-31. As Judge Winter points out, however, these limits are drastically below realistic spending levels for competitive races. First, average spending across all elections understates the cost of competitive elections because it includes elections "that were not seriously contested or perhaps not contested at all – elections in which little communication took place and little was spent." *Landell II*, 382 F.3d at 173 (Winter, J., dissenting). Second, reported spending numbers for elections held before Act 64's passage include only spending by candidates, not related spending by their supporters. *Id.* at 172-73 (Winter, J., dissenting). Because Act 64 defines candidate expenditures to capture related expenditures by supporters, *see* Vt. Stat. Ann. tit. 17, § 2809, just to keep spending under the new law at historical levels would require setting expenditure limits *above* those historical levels. Finally, Act 64 includes within the expenditure limits "substantial costs of compliance with its terms that were not encountered under the prior law." *Landell II*, 382 F.3d at 173 (Winter, J., dissenting). For example, fees of attorneys – who are a virtual necessity under this reticulated statute – are included as campaign expenditures. Such compliance costs will further eat into limits that, because they are based on past average spending, are already so low that they unconstitutionally magnify the advantage of incumbents.

Only one aspect of Vermont's campaign-finance legislation seems to point away from incumbent protection as

a motivation (and the panel majority seizes upon it, *see id.* at 128): incumbents can spend only 85 to 90 percent of what challengers can spend, depending on the office. Vt. Stat. Ann. tit. 17, § 2805a(c). This small gesture is greatly outweighed, however, by other features of the legislation and the natural advantages of incumbency. Most significantly, the spending caps cover a two-year election cycle and do not set separate caps for primary and general elections. *Id.* § 2805a(a). As Judge Winter aptly notes, this provision "will in the main favor incumbents, who face serious primary challengers less frequently than those seeking a party nomination to challenge an incumbent. Indeed, there appears to be little other reason justifying the choice of the two-year cycle." *Landell II*, 382 F.3d at 180 (Winter, J., dissenting). By contrast, the expenditure limits struck down in *Buckley* at least had the virtue of providing separate limits for primary and general elections. *See* 424 U.S. at 54-55. Further, the Vermont expenditure limits are so low that they "significantly increase[] the reputation-related [and] media-related advantages of incumbency and thereby insulate[] legislators from effective electoral challenge." *Shrink Missouri*, 528 U.S. at 404 (Breyer, J., concurring).

III. Conclusion

This case began in the district court almost six years ago; it was argued before a panel of this court almost four years ago. Instead of cleanly resolving, on the basis of *Buckley*, that Vermont's campaign-expenditure limitations are unconstitutional, the panel majority has now sent the case back to the district court for yet more proceedings. I well appreciate and support the Second Circuit's traditional reluctance to hear cases in banc. *See* Jon O. Newman, *The Second Circuit Review 1982-83 Term — Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 Brook. L. Rev. 365 (1984). By refusing to hear this important case in banc, however, the court has failed to live

up to its constitutional responsibilities. I respectfully dissent.

DENNIS JACOBS, Circuit Judge, joined by JOHN M. WALKER, JR., Chief Judge, and JOSE A. CABRANES and RICHARD C. WESLEY, Circuit Judges, dissenting from the denial of rehearing *in banc:*

I dissent from the denial of rehearing *in banc.*

I cannot add to the number or force of the arguments set out in Judge Winter's dissent from the majority opinion. *Landell v Sorrell*, 382 F.3d 91, 149 (2d Cir. 2004) (Winter, J., concurring in part and dissenting in part) [hereinafter *Landell Dissent*]. Compelling as Judge Winter's dissent is qua dissent, it transcends the genre. It is scintillating; it marshals the facts and authorities in a way that is learned and witty, often at the same time; it is a crackling good read by any standard of law or letters.

I will therefore confine myself to (i) reasons why *in banc* review is warranted now rather than after the remand, and (ii) things I cannot resist saying.

I

It cannot be seriously disputed that the issues presented are of exceptional significance. Vermont's Act 64 rations the political speech of all candidates seeking any state office in one of the three states within our jurisdiction, and it applies all the time, in back-to-back two-year cycles. *See* 1997 Vermont Campaign Finance Reform Act (codified as Vt. Stat. Ann. tit. 17, §§ 2801-2883).

To justify this sweeping limit on political speech, the Vermont Legislature invokes two interests: (a) fighting corruption (and the appearance thereof) and (b) conserving the time of public officials. The majority opinion accepts these interests as the genuine purposes of the Act and holds that, taken together, they are a compelling justification that satisfies strict scrutiny; it remands only for the district court to decide whether the Act's expenditure

limits are narrowly tailored. *Landell*, 382 F.3d at 124-25, 135-37. This remand for narrow tailoring presumes – erroneously – that the Legislature's professed interests are compelling. I conclude they are not compelling, and that we may not take on trust that the interests professed by the incumbents who enacted the Act are their interests in fact – especially since the dominant but impermissible effect of the Act is to protect incumbents.

A. The Legislature's Asserted Interests Are Not Compelling

Buckley unambiguously rejected the anti-corruption rationale for limiting (candidate and independent) expenditures in political campaigns. *See Buckley v. Valeo*, 424 U.S. 1, 45-47, 53,55-58 (1976) (*per curiam*).[5] The interest in saving the time of elected officials is demolished by Judge Winter in his dissent, 382 F.3d at 192-94. Ironically, Vermont officials could reduce the amount of their time spent fundraising simply by raising or eliminating the contribution caps they previously enacted (and further reduce by the Act), which obviously require contacts with more donors in order to raise a given amount of money. *See Landell*, 382 F.3d at 123-24. Thus the *more-restrictive* expenditure limits have been enacted to mitigate the inevitable and predictable side-effects of the *less-restrictive* contribution limits. *See id.* at 123-24, 127-28. It is as though a town were to justify a ban on adult establishments by citing the noxious concentration of them caused by a prior ordinance designating a single block as the sole zone for such enterprises. Strict scrutiny does not tolerate such bootstrapping. Thus in *Buckley*, the Court warned that

[5] Over the intervening three decades, the Supreme Court has deviated from this holding just once and narrowly, to deal with concerns raised by the "unique state-conferred corporate structure." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990).

because expenditure limits directly restrict political speech, FECA's independent expenditure limits could not "be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." 424 U.S. at 44.

The panel opinion contends that the combination of these two insufficient interests is enough, a sort of synergy of nothing with nothing. Strict scrutiny is not so yielding, especially here: "'[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley*, 42 4 U.S. at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). A remand for narrow tailoring cannot remedy the root defect that the Act's prohibition on speech serves no compelling state interest (just as tailoring was not the problem with the Emperor's New Clothes).

B. The Act Entrenches Incumbents

By remanding for narrow tailoring, the majority opinion implicitly assumes that the interests cited by the Vermont Legislature are genuine (as well as sufficient), and that the sole effect of the Act will be to advance those interests. But when a law restricts speech in a way that tends to insulate office-holders from challenge, it is neither reasonable nor prudent to treat legislative motive as an issue of fact. *See Landell*, 382 F.3d at 112-14 ("[W]e do not question the validity of the factual findings developed by the legislature in support of Act 64[.]"). Protecting speech requires that courts be skeptical and assume the worst – not as a matter of fact, but as a matter of prudence and policy.

Here, it is easy to demonstrate that the salient effect of the Act is to entrench incumbents--an effect that is fatal under the First Amendment. *Buckley* characterized as "more serious" the argument that contribution and expenditure limits, taken together, "invidiously discriminate against

major-party challengers and minor-party candidates." 424 U.S. at 31 n.33. The Court warned that though "the Act, on its face, appears to be evenhanded[, t]he appearance of fairness. . . may not reflect political reality." *Id.* Given the powerful built-in advantages of incumbency, "the overall effect of the contribution and expenditure limitations [in FECA] could foreclose any fair opportunity of a successful challenge." *Id.*

Strict scrutiny therefore requires that we consider the Vermont Act, and specifically the Legislature's proffered interests, with a cold eye. That is what the Supreme Court did in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). The Government cited budgetary and prudential reasons for legislation curtailing funds for legal service organizations that challenged existing welfare law. *Velazquez* disregarded those reasons because the effect of the legislation was unconstitutionally to "insulate the Government's interpretation of the Constitution from judicial challenge." *Id.* at 547-49. Here, the undeniable effect of the Act is to insulate incumbents from effective electoral challenge--a much more direct and effective way to insulate the government from criticism and ouster.

It is beyond dispute that campaign-expenditure caps magnify the already formidable advantages of incumbency. Among those advantages are name recognition and news coverage; free staff use and constituent services; official letterheads and web sites; franking privileges; the celebrity and glamour that attends office-holders when they visit diners, schools, nursing homes, churches, hospitals, clubs, bus-stops and barbershops; etc., etc. *See Landell Dissent*, 382 F.3d at 178-81. The Act further benefits incumbents because the expenditure caps are the same whether or not a candidate faces a primary contest--which of course is more frequently a hurdle for challengers than for incumbents. *See id.* at 160-61, 180.

The panel majority urges that the Act's expenditure limits "are not so radical in effect as to drive the sound of a candidate's voice below the level of notice." *Landell*, 382

F.3d at 128-31 (quotation omitted). But as Judge Winter points out, under a "level of notice" standard, an incumbent, who by virtue of her position already enjoys prominence in the community, starts her campaign "at the 'level of notice' at which a challenger's campaign may be stopped by government." *Landell Dissent*, 382 F.3d at 199.

It would take a childlike credulity to think that these advantages to incumbency have gone unnoticed by Vermont's elected officials.[6] That is why I am unimpressed by the argument that the Act was adopted by an overwhelming bipartisan majority. *See Landell*, 382 F.3d at 100. If one is an incumbent office-holder in Vermont, what's not to like?

II

The panel majority upholds without remand provisions of the Act that enforce the caps on fundraising and contributions by treating local, county, state, regional, and national affiliates of a political party as a single unit. *See* Vt. Stat. Ann. tit. 17, §§ 2801(5), 2805. These provisions will stifle local politics by weakening (or killing) county, municipal, and village party organizations across the state. This is no small thing. Local parties frequently part company from the state and national party in order to appeal to the social, political, cultural, and demographic profiles of their communities. No such pervasive suppression of political activity has ever been accepted by an American appellate court with scrutiny so deferential and perfunctory. *See Landell*, 382 F.3d at 143-44.

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[6] A fig leaf provides that incumbents may spend only 85 or 90% of the full limits (depending on the race). See Vt. Stat. Ann. tit. 17, § 2805a(c). This just shows that the Legislature understood that offense is better than defense; not a word in the record suggests that this marginal differential is sufficient to overcome the numerous and powerful advantages of incumbency.

III

Delay pending remand saves us nothing. No matter what happens on remand, there will be an appeal by one side or the other, maybe both. And in the interval – while the case is on remand in the district court, and during the post-remand appeal – the holdings of the majority opinion will be law of this Circuit. The green light has been given to New York and Connecticut (signatories to the States' amicus brief in support of the Act), the hundred counties, and the thousand municipalities under our jurisdiction, to consider and adopt similar limitations on campaign expenditures.

Moreover, the terms of the remand create problems of their own. What evidence is a judge supposed to examine to determine whether one type of regulation or one particular dollar amount is "as effective" as another at preventing corruption or conserving an office-holder's time? *See id.* at 133-36. Worse, the district court is being asked to make findings as to what level of spending will induce Vermont politicians to make corrupt decisions. *See id.* at 134-36. This kind of inquiry is grossly inappropriate for a federal court.

IV

There is another (overriding) problem that cannot be fixed on remand. Obviously, the Act was engineered to provide an opportunity for the Supreme Court to revisit existing law in this area. The Vermont Secretary of State has publicly noted the "express legislative goal of giving the Supreme Court an opportunity to reevaluate its decision in *Buckley v. Valeo*." Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont's Campaign Finance Law (Jan. 9, 2001), *available at* http://vermont-elections.org/elections1/2001GAMemoCF.html. But until the Supreme Court alters course, *we* must follow straight.

See State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Activists on every side may start or incite litigation with test cases and test laws. But it is not our role to provoke the Supreme Court into reconsidering its precedent by an aggressive (or fanciful) ruling on a vital subject. This is a matter of hierarchy.

V

Would any judge uphold *any* limit on political speech if it were not that many constitutional-law professors and news media lend their prestige and voice to such measures? It is a big mistake, however, to decide a case on the buried assumption that these self-described protectors of the First Amendment confer a reliable imprimatur.

Constitutional rulings cannot safely be made on the assumption that constitutional-law professors serve the Constitution as disinterested scholars and technocrats. These professors take no oath to support the Constitution. Granting that some of them have expertise derived from long and painstaking study, we should keep in mind that many of them regard the Constitution instrumentally – the way a safecracker regards a safe.

Similarly, the news organs are interested players in political controversy. It is a fallacy to think that the press is a reliable defender of speech or that the First Amendment is safe in its hands. True, the mainstream press assiduously defends its own expressive and commercial rights, as well as the rights of those whose speech generates saleable news and those who do not compete with the press for influence (such

as skinheads, pornographers, performance artists, and the like). But no one should be surprised that the largest news media, secure in their editorial powers, join avidly in suppressing speech by competing sources of information and opinion at campaign time.

One arresting irony of this case is that the present Act can be used to limit the speech of the newspapers and the broadcast media. If a newspaper wishes to publish a story on a candidate and requests a photo, interview, or statement, and if the candidate provides such materials, the value of the ensuing publication counts against the candidate's contribution and expenditure limits. *See Landell Dissent*, 382 F.3d at 168-69. And in time, Vermont's legislators may conclude that the newspapers and broadcast media so control the public agenda, so forcefully channel legislative energies to serve publishers' views and interests, and so thoroughly monopolize the time of legislators vying for journalistic coverage and approval, that some reasonable limits should be placed on them. The Fourth Estate may be able to defend itself, but under the majority's decision, the Fourth Estate may not be able to get much help in the federal courts of this Circuit.

* * *

States may be laboratories of democracy, and they should have leeway to experiment, but innovation is limited by the Constitution. The Act at issue in this case is as unconstitutional as if Vermont were to create a dukedom, apply the thumbscrew, or tax Wisconsin cheese.

JOSE A. CABRANES, Circuit Judge, with whom WALKER, Chief Judge, and JACOBS and WESLEY, Circuit Judges, join, dissenting from the denial of rehearing in banc:

I am pleased to join the opinions of Chief Judge Walker and Judge Jacobs, dissenting from the denial of rehearing *in banc*. I add only a brief comment.

In his comprehensive and fully persuasive dissent from the decision of the panel, with which I concur fully, Judge Winter ably and admirably identified the grave constitutional concerns raised by Vermont's Campaign Finance Reform Act, codified at Vt. Stat. Ann. tit. 17, §§ 2801-2883 ("Act 64"). Judge Winter's opinion is a *tour de force* and, as Judge Jacobs aptly observes, a great read. I take this opportunity to commend Judge Winter's opinion to readers, including most especially the Justices of the Supreme Court. I write separately only to reemphasize one concern with our Court's decision to deny *in banc* review of this case.

Under *Buckley v. Valeo*, 424 U.S. 1 (1976), Act 64's campaign expenditure limits are, without a doubt, unconstitutional. *See, e.g., Buckley*, 424 U.S. at 39 (recognizing that campaign expenditure limits, even when "neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms'"). In our system, the Supreme Court is free to revisit this question and free to overrule its own precedents. A court of appeals is not at liberty to do the same.

The particular expenditure limits imposed by Act 64

are so laughably low[1] that they cannot but impede meaningful debate of public issues in violation of the First Amendment's guarantee of free speech. *See Buckley,* 424 U.S. at 93 n.127. The attempts of the Vermont legislature to dress up the "legitimate" rationales buttressing Act 64—fighting corruption and conserving public officials' time—collapse under the weight of Act 64's more probable consequences, which include (1) an almost certain and drastic reduction of political speech, (2) potentially insurmountable disadvantages to challengers of incumbents, and (3) severe limitations on press coverage of political races. *See Landell v. Sorrell,* 382 F.3d 91, 176-82 (2d Cir. 2004) (Winter, J., dissenting).

Where government seeks to "regulate political speech the way it regulates public utilities," *id.* at 153, and protects incumbents at the expense of political expression, it is the role of the courts to defend the Constitution and to promote the principles of free speech that sustain our democratic order, not to enable bald-faced political perfectionism.

The majority's ruling is a clear departure from the Supreme Court's ruling in *Buckley.* I therefore dissent from the denial of rehearing *in banc.*

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[1] See Vt. Stat. Ann. tit. 17, § 2805a (limiting campaign expenditures based on office candidate is seeking: $300,000 for governor; $100,000 for lieutenant governor; $45,000 for secretary of state, state treasurer, auditor of accounts or attorney general; $4,000 for state senator, plus an additional $2,500 for each additional seat in the senate district; $4,000 for county office; $3,000 for state representative in a two-member district; and $2,000 for state representative in a single-member district).